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October Term, 1951.

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

BOSTON RAILROAD HOLDING COMPANY ET ALS.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Your petitioner, The Delaware and Hudson Company, respectfully prays that a writ of certiorari be issued to review the "decree after rescript" of the Supreme Judicial Court of the Commonwealth of Massachusetts for Suffolk County entered November 27, 1951, which decree was entered pursuant to rescript (R. 106) from the Full Bench of the Supreme Judicial Court for said Commonwealth entered November 9, 1951, in proceedings arising out of the statutory dissolution and liquidation of the property of Boston Railroad Holding Company (hereinafter called the Holding Company) pursuant to Massachusetts Acts of 1946, c. 518, and involving the relative rights of the different holders of the Holding Company's preferred shares in the liquidation of the Holding Company's prop-

erty, consisting entirely of shares in the Boston & Maine Railroad or proceeds from the sale thereof. Such decree was entered on the petition filed by your petitioner on December 7, 1949 (R. 1-18), praying that your petitioner, as the holder of 10,000 shares of the preferred stock of the Holding Company, and the holders of the remaining 14,150 shares of the publicly held preferred stock of the Holding Company, be adjudged entitled to preference and priority over the other preferred stock of the Holding Company, all owned by New York, New Haven & Hartford Railroad (hereinafter called New Haven), in the liquidation of the Holding Company's property. Among the grounds stated in the petition in support of the above-mentioned priority in favor of the publicly held preferred stock of the Holding Company were:

(1) a right of preference arising from the sale by the New Haven to the public in 1911 of part of its preferred shares all of which had a statutory lien on all the Boston & Maine stock at any time owned by the Holding Company and from the guaranty by the New Haven of the payment of cumulative dividends and, in the event of liquidation, of $100 upon each share of the preferred stock so sold to the public;

(2) an independent right of preference in any liquidation of the Holding Company established in favor of the publicly-held preferred stock of the Holding Company over the preferred stock owned by the New Haven by the consent decree entered October 17, 1914, and the decree entered at the New Haven's request on June 4, 1923, in proceedings under the Sherman Act by the United States District Court for the Southern District of New York in the case of *United States of America* v. *New York, New Haven & Hartford Railroad Company et al.*

Opinion Below.

The opinion of the Supreme Judicial Court is reported in Massachusetts Advance Sheets for 1951, page 1093, 102 N.E. (2d) 67, and appears at pages 84 to 105 of the Record.

The majority opinion held that the right of priority claimed by your petitioner did exist under Massachusetts law (R. 96, 101) but that such priority was destroyed (R. 97) by the "Consummation Order and Final Decree" entered September 11, 1947, by the United States District Court for the District of Connecticut (R. 41, 93) in the reorganization of the New Haven under Section 77 of the Bankruptcy Act, and that no independent right to priority was created by the anti-trust decrees.

The majority opinion of the Massachusetts court seems to proceed on the theory that the Holding Company was in bankruptcy or reorganization, which it was not, and that somehow the discharge in bankruptcy of the New Haven which had guaranteed the Holding Company's publicly held preferred stock destroyed the preference theretofore enjoyed by such stock.

The separate opinion of Counihan, J. (R. 105), dissented as to the effect of the decree entered June 4, 1923, in the anti-trust proceedings and held that under such decree your petitioner and other holders of the publicly held preferred stock were entitled to priority over the preferred stock held by the New Haven in any liquidation of the Holding Company.

Questions Presented.

1. Whether the discharge granted the New Haven, under the consummation order and final decree, in its reorganization under Section 77 of the Bankruptcy Act,

deprived the publicly held preferred stock of the Holding Company (a Massachusetts corporation not at any time a bankrupt or a debtor in reorganization proceedings) of the right to be preferred over preferred stock of the Holding Company owned by the New Haven in any liquidation of the Holding Company—a right of priority which, as the court decided, existed under Massachusetts law in favor of the publicly held preferred stock "down to the time of the consummation decree" (R. 101).

2. Whether the decrees of October 17, 1914, and June 4, 1923 entered in the United States District Court for the Southern District of New York established an independent right of priority in favor of the publicly held preferred stock of the Holding Company in any liquidation of that company which was not destroyed by discharge of the New Haven in proceedings for its reorganization under Section 77 of the Bankruptcy Act.

Summary Statement of the Matter Involved.

This litigation represents another chapter in the long struggle which began when, in 1906, the New Haven Railroad acquired a controlling interest in the stock of the Boston & Maine Railroad, a transaction which the Supreme Judicial Court of Massachusetts in 1908 held to be *ultra vires* the New Haven. See *Attorney General* v. *New York, New Haven & Hartford Railroad Co.*, 198 Mass. 413, 418-420. When the facts of this transaction first became known, intense public opposition was aroused in New England and elsewhere. See Mason, *Brandeis, A Free Man's Life* (Viking Press, 1946), chapters 12 and 13. Sen. Doc. No. 543, 63d Cong., 2d Sess. As a result of this situation, Boston Railroad Holding Company was created in 1909 by Special Act of the Massachusetts Legislature for the

purpose of acquiring the New Haven's Boston & Maine stock, thus permitting the New Haven to retain indirectly its controlling interest in the Boston & Maine while submitting it to some measure of control by the Massachusetts Legislature (St. 1909, c. 519). For history of this legislation see *Codman* v. *New York, New Haven & Hartford Railroad Co.*, 253 Mass. 144; *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591; *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.*, 323 Mass. 282.

St. 1909, c. 519, provided: the stock of the Boston & Maine which might be acquired by the Holding Company should not thereafter be sold without express authority from the Legislature; any railroad corporation incorporated under the laws of Massachusetts at the date of passage of the Act might guarantee the principal of and the dividends and interest upon the stock and bonds of the Holding Company; and the stock of the Holding Company should not be sold or be transferable without such a guaranty. Following incorporation of the Holding Company, large blocks of Boston & Maine stock were transferred to it in return for issuance to the New Haven of 31,065 shares of capital stock of the Holding Company and certain debentures. This stock is still held by the New Haven, and is all of the capital or common stock of that company now outstanding and the only stock of the Holding Company having power to vote (R. 34-35).

In 1910, further Massachusetts legislation authorized the Holding Company to issue preferred stock (St. 1910, c. 639). Section 2 of that Act created a statutory lien in favor of the preferred stock in the following terms:

> "Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock,

to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company."

In the years 1910 and 1911 the Holding Company duly issued 272,939 shares of preferred stock in accordance with and pursuant to the provisions of the 1910 Act (R. 35). The greater part of this preferred stock was issued to the New Haven in exchange for its debentures of the Holding Company. The balance of the preferred stock was purchased by the New Haven and the cash received therefor used by the Holding Company to purchase further shares of Boston & Maine stock (R. 35).

Between January 10, 1911, and June 30, 1911, the New Haven sold to various members of the public 28,000 shares of this preferred stock. In accordance with the provisions of the statutes referred to, the New Haven caused the certificates for these 28,000 shares to be endorsed with a guaranty duly executed by it and reading as follows:

"For value received, The New York, New Haven & Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts, and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter

639 of the Acts of Massachusetts of the year 1910." (R. 35-36.)

When, in the year 1944, The Delaware and Hudson Company acquired 10,000 of these 28,000 shares, the certificates bore the New Haven's above endorsement, and when new certificates were delivered they bore a like endorsement duly executed by the New Haven (R. 36). Of the 28,000 shares, 24,150 shares (including the 10,000 shares held by your petitioner) are still held by the public.

On July 23, 1914, the United States of America brought a suit in equity in the District Court of the United States for the Southern District of New York in which the New Haven, the Holding Company and other corporations and individuals were named as defendants, and in which it was alleged that the defendants were violating the Sherman Anti-Trust Act (R. 43). It was alleged that the New Haven was the principal instrumentality for effecting the alleged unlawful practices and results set forth in the petition. Appearances were filed in these proceedings by both the New Haven and the Holding Company. On October 17, 1914, a consent decree was entered in these proceedings. A copy of the material portions of this decree is annexed to the agreed statement and marked "D" (R. 62-78).

This decree adjudged that the New Haven and the other defendants were combinations in restraint of trade and had attempted to monopolize and were monopolizing a part of interstate trade and commerce. It also directed the New Haven to assign its common stock and preferred stock of the Holding Company to trustees. The decree provided for the sale by the trustees of the Boston & Maine shares owned by the Holding Company, free from the statutory lien in respect of the preferred stock of the Holding Company owned by the New Haven and subject only to the lien

of the 28,000 shares of preferred stock of the Holding Company held by other persons.

The decree directed that out of the proceeds from the sales of property of the Holding Company the trustees should pay—

> (*a*) all the debts of the Holding Company and all reasonable expenses;
>
> (*b*) all sums due to the holders of the 28,000 shares of the preferred stock of the Holding Company upon the winding up of its affairs;
>
> (*c*) the balance of the proceeds to the New Haven Company or its legal representatives or assigns when and as released.

The time fixed in the 1914 decree within which the trustees were directed to sell the Boston & Maine stock was subsequently extended from time to time and the Boston & Maine stock remained unsold when, on May 8, 1923, the New Haven filed a petition, a copy of which is annexed to the agreed statement (R. 78-81). In this petition the New Haven asked that the 1914 consent decree be modified in substance so as to permit the trustees appointed thereunder to return to the New Haven its stock in the Holding Company. In this petition the New Haven expressly made its request subject to the proviso (R. 80):

> ". . . that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall be in no manner diminished or impaired."

On this petition a decree was entered on June 4, 1923 (R. 82-84), which provided in part:

> ". . . That said decree entered October 17, 1914, be amended by striking out all the provisions in paragraphs numbered First and Second of said decree, excepting that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons to be preferred in any Liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of the said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall in no manner be diminished or impaired, and the certificates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference."

Pursuant to the decree of June 4, 1923, the stock of the Holding Company in the hands of the trustees was returned to the New Haven, and at or about that time the Holding Company caused the following legend to be stamped on the certificates representing all of the said 28,000 shares of preferred stock of the Holding Company:

> "'The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others.'" (R. 44.)

On October 23, 1935, the New Haven filed a petition for its reorganization under Section 77 of the Bankruptcy Act in the District Court of the United States for the District of Connecticut. Pursuant to that court's order No. 45, Arthur P. Russell, an officer of the New Haven and also of the Holding Company, filed claim No. 82, "in behalf of the 24,150 shares of the Holding Company preferred stock outstanding in the hands of the public" (R. 37). This was the only claim filed on behalf of this stock. On July 28, 1944, the court entered a memorandum of decision on this claim in which it allowed a common claim (payable under clause (17), section J, of the Plan in common stock of the reorganized company) against the estate of the New Haven for breach of its guaranty of cumulative dividends upon the publicly held preferred stock of the Holding Company and upon the preferred stock of that company held in its treasury in the amount of $32 per share (R. 40). The court allowed nothing by way of common claim or otherwise in connection with the New Haven's promise to pay the $100 per share provided by the New Haven's guaranty (R. 41). The Delaware and Hudson Company has received nothing in connection with its stock in the Holding Company as a result of the New Haven bankruptcy proceedings (R. 45).

The Plan of Reorganization of the New Haven, approved and certified by the Interstate Commerce Commission and approved and confirmed by the court, provided (R. 39):

> "Sec. K . . . The principal debtor's guaranties of . . . the preferred stock of the Boston Railroad Holding Company shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in Clause (17) of Section J hereof. Nothing herein contained shall in any way impair any right of the public holders of the 24,150

preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

On September 11, 1947, the United States District Court for the District of Connecticut entered its order No. 1007 entitled "Consummation Order and Final Decree." Paragraph 3 of subdivision II of this decree provided in part as follows (R. 41, 42):

"Transfer and Discharge. Upon the consummation date:

"(i) all the business and affairs and the entire property and estate of the Debtor and the Secondary Debtors of every name and nature and all right, title and interest of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of the Debtor and the Secondary Debtors (herein called the 'Bankruptcy Trustees'), the Certificate of Amendments having first been filed in the Office of the Secretary of State of the State of Connecticut, shall vest in and become the absolute property of the Reorganized Company, free and clear of all claims, rights, demands, interest, liens, encumbrances of creditors or other obligees of the Debtor, or of the Secondary Debtors, or their properties, except for the claims hereinafter referred to, which are to be assumed or paid by the Reorganized Company and of all rights and claims of the holders of shares of the capital stock of the Debtor and the Secondary Debtors:

> "(ii) the Debtor and the Secondary Debtors shall be discharged and released forever from all of their obligations, debts and liabilities, whether or not presented or allowed in these proceedings, including, without limitation, all claims made, assumed or guaranteed by the Debtor or the Secondary Debtors or enforceable against their property, except such claims as are to be paid or assumed by the Reorganized Company in accord with the Plan: . . ."

The consummation order and final decree also contained an injunction (R. 42-43).

At the present time the property of the Holding Company consists entirely of shares of stock of various classes of the Boston & Maine Railroad and the proceeds of such stock thereof as has been sold by the Receiver (R. 45). The fair market value of the Boston & Maine stock owned by the Holding Company on the basis of the most recent market quotations available on January 12, 1951 (including the proceeds from the sales thereof), did not exceed $4,000,000 (R. 47). The New Haven now holds 247,759 shares of preferred stock of the Holding Company of the par value of $24,775,900, including 2820 shares formerly sold and guaranteed by it and later reacquired. 24,150 shares of the preferred stock guaranteed by the New Haven with a par value of $2,415,000 are now held by persons other than the Holding Company or the New Haven, on which no dividends have been paid since July 10, 1937 (R. 36, 37).

In 1946 the Holding Company was dissolved by Special Act of the Massachusetts Legislature (St. 1946, c. 518), which authorized appointment of a receiver under certain circumstances, regulated in various ways the manner in which the affairs of the Holding Company were to be wound up and provided that the Receiver should distribute the

assets in accordance with the rights of the respective parties in interest. By decree dated June 15, 1949, a receiver was duly appointed in accordance with this statute (R. 34). On December 7, 1949, your petitioner filed its petition (R. 1-18) for determination of rights of the publicly held preferred stock. The Single Justice reported the case without decision on the pleadings and agreed statement to the Full Bench (R. 1).

Statutes Involved.

The statutes involved are Section 77 of the Bankruptcy Act, particularly paragraph (f), U.S.C. (1946 Ed.) Title 11, § 205 (f), and the Massachusetts statutes governing the Holding Company (St. 1909, c. 519; St. 1910, c. 639; St. 1946, c. 518; see Appendix, *infra*, pp. 33 to 44).

Jurisdiction.

Title 28 U.S.C. section 1257(3) gives this court jurisdiction to review by writ of certiorari final decrees rendered by the highest court of a state "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treatise or statutes of, or commission held or authority exercised under, the United States." In the present case the court below, as appears from its opinion, decided two substantial Federal questions adversely to the petitioner.

The first such question relates to the effect of the consummation decree entered in proceedings for the reorganization of the New Haven under Section 77 of the United States Bankruptcy Act. In its petition filed December 7, 1949, The Delaware and Hudson Company alleged (R. 3) the sale by the New Haven of preferred stock of the Hold-

ing Company guaranteed by the New Haven as required by statute, alleged (R. 3, 4) that the New Haven filed a petition for a reorganization under Section 77 of the Bankruptcy Act in 1935, set out (R. 4) certain provisions of the plan of reorganization approved and confirmed by the court, and asserted (R. 5) that under the foregoing circumstances the "publicly held preferred stock of the Holding Company (all bearing the New Haven's unperformed guaranty) is and should be entitled to preference over the preferred stock bearing no such guaranty owned by the New Haven." In paragraph 10 of its answer (R. 26-28) the New Haven specifically set up certain portions of the "consummation order and final decree" entered September 11, 1947, by the District Court of the United States for the District of Connecticut. In its opinion the court below (see R. 95-98, 101) held that under Massachusetts law, as a result of the guaranty, a priority in favor of the publicly held stock did exist down to the time of the consummation order and final decree, but that this right was destroyed by that order and decree. Where a right granted by the Bankruptcy Act is at issue, or where there is a question as to the effect of proceedings in bankruptcy and of a discharge granted therein, a Federal issue is raised. *Lesser* v. *Gray*, 236 U.S. 70. *Zavelo* v. *Reeves*, 227 U.S. 625. *Rector* v. *City Deposit Bank Co.*, 200 U.S. 405. The issue thus raised in the present case is substantial because, as shown below, the Massachusetts court extends the effect of a discharge in bankruptcy so as to alter not only relations between the debtor and its creditors or stockholders, but the relations between two groups of stockholders of another corporation not a debtor in reorganization, a thing which the Federal court in Connecticut neither had the power to do under applicable decisions of this court nor attempted to do. In effect the Massachusetts court, in reaching the conclusion it did, virtually nullified a plan of

reorganization approved and certified by the Interstate Commerce Commission and approved and confirmed by the Bankruptcy Court.

A second Federal issue relates to the effect of the anti-trust decrees in the United States District Court for the Southern District of New York. Petitioner claimed a priority under the terms of these decrees as a separate ground for the relief sought (R. 5-8). The court below decided this issue adversely to the petitioner (R. 98, 99). A right claimed under the decree of a Federal court is a right "claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." *Donohue* v. *Vosper*, 243 U.S. 59. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33. This question likewise is substantial, not only because it, like the first question, involves large amounts of money to members of the public, but because it raises substantial questions as to enforcement of the anti-trust laws.

Reasons for Granting the Writ.

I.

IN DECIDING THAT THE CONSUMMATION ORDER AND FINAL DECREE IN THE NEW HAVEN REORGANIZATION PROCEEDINGS DESTROYED THE PRIORITY OF THE PUBLICLY HELD PREFERRED STOCK, THE MASSACHUSETTS COURT DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT OR WITH THE BANKRUPTCY ACT.

1. The petitioner contended before the court below that the sale and guaranty by the New Haven of a portion of its preferred stock, secured by the statutory lien, created a priority in favor of the publicly held preferred stock in

any liquidation of the Holding Company. The court below decided (R. 101):

> "Down to the time of the Consummation Decree, priority in favor of the publicly held stock *did* exist. But, as we have stated above, the situation was different after the Consummation Decree." (Italics in original.)

The principle of Massachusetts law establishing this priority was determined to be as follows (R. 95, 96):

> "The petitioner argues that this guaranty was tantamount to an agreement on the part of the New Haven to subordinate its interests in the assets of the holding company to the interests of the holders of the public preferred, all of whose stock had been guaranteed. The petitioner relies on such cases as *Matter of Title & Mortgage Guaranty Co. of Sullivan County*, 275 N. Y. 347, *Pink* v. *Thomas*, 282 N. Y. 10, *Ferris* v. *Prudence Realization Corp.*, 292 N. Y. 210, S. C. 323 U. S. 650, and *Agricultural Trust & Savings Company's Mortgage Pool Case*, 329 Pa. 581. These cases hold that a guarantor of mortgage certificates, who also has an interest in the mortgage, cannot share in the proceeds of its collection until the certificate holders are paid, unless there is a clear reservation in the certificate of the right of the guarantor to share on a parity with other certificate holders. The rationale of these cases seems to be that, if the guarantor were to share in the proceeds of the security before the holders of the guaranteed obligations have been paid, he would be derogating from his guaranty. This principle finds support in many jurisdictions and appears to be the prevailing rule. We accept it as the law of this Commonwealth."

The foregoing determination is conclusive as to the applicable Massachusetts law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

2. Having held that the New Haven's guaranty and the attendant circumstances did create a right of priority in the publicly held preferred, the court below decided that this right was destroyed by the "Consummation Order and Final Decree," particularly by paragraph 3 of subdivision II thereof (R. 41, quoted at p. 11, above), which contained the customary provisions in general terms discharging the debtor and its property and vesting its property in the reorganized company. The court below stated (R. 96, 97):

> "As indicated above, the consummation decree entered in 1947 released the New Haven from its guaranty of the preferred stock of the holding company and was an effective bar to the enforcement of that guaranty. Provision was made for the revesting in the reorganized New Haven of its 'entire property . . . free and clear of all claims . . . liens, [and] encumbrances of creditors, or other obligees' of the New Haven, which, of course, included its preferred shares in the holding company. The New Haven was 'discharged and released forever from all of . . . [its] obligations, debts and liabilities.' All persons, firms and corporations were enjoined from further prosecuting by any type of proceedings any claims against the New Haven except those specifically imposed on it during the course of the reorganization. Reading the plan of reorganization and the consummation decree together, we think that their combined effect was to reconstitute the reorganized New Haven the absolute owner of its shares of preferred stock in

the holding company, that as such an owner it was to have all the rights accorded to those shares by St. 1910, c. 639, and that it was not thenceforth to be affected in any way by its earlier guaranty of the preferred shares sold to the public. Thus with the guaranty no longer enforceable the principle now invoked by the petitioner has no application."

The court thus stressed those provisions of the final decree which revested in the reorganized New Haven its property free and clear of all claims, liens and encumbrances of creditors of the New Haven. In doing so the court completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock. Rather it is a right to priority in liquidation of the Boston and Maine stock owned by the Holding Company, never a debtor in the reorganization of the New Haven. The rights asserted by your petitioner are rights in property of the Holding Company, not in property of the New Haven.

3. The court below erred in other respects in dealing with the consummation decree in bankruptcy. The petitioner contended in the court below that the utmost that the New Haven's discharge did was to constitute a personal defense, if pleaded, to an action on the guaranty; and that the obligation itself was not extinguished; and that the prior lien in favor of the publicly held preferred shares upon the Holding Company's Boston & Maine stocks growing out of the Massachusetts statutes and the New Haven's sale and guaranty of a portion of its preferred stock was unimpaired. As to this contention the court stated (R. pp. 97, 98):

". . . We think that it would be giving too narrow effect to that decree in view of its broad language to

> keep alive rights flowing from the guaranty on the technical ground that only the remedy to enforce it was barred. As was said by Holmes, J., in *The Western Maid*, 257 U. S. 419, at page 443, 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.' "

The decision of the court below on the foregoing point is at variance with *Zavelo* v. *Reeves*, 227 U.S. 625, 629.

4. The fundamental error of the court below is shown by the statement in its opinion (R. 98):

> "Were the Petitioner's argument to prevail, it would defeat and render illusory an important objective of the Consummation Decree."

The court thus considered that destruction of the priority of the publicly held preferred stock was an important feature of the New Haven's reorganization, a conclusion which betrays a misunderstanding of the reorganization plan itself and also of the consummation order and final decree, which merely effectuated the plan. On the contrary, the plan carefully preserved the priority of the publicly held preferred shares in section K (R. 41). The portions of the consummation order and final decree which were relied upon by the court below do not refer to the Holding Company or its publicly held preferred shares or to the New Haven as a holder of its preferred shares, and they merely contain the usual provisions transferring to the reorganized New Haven its property, free and clear of liens other than those provided for in the plan, discharging the reorganized New Haven of obligations except those to be assumed under the plan, and the usual injunctive provisions.

Neither the Interstate Commerce Commission in approving the plan, nor the United States District Court for the District of Connecticut in its consummation order and final decree, intended or attempted to alter the existing relations between the New Haven and the other preferred stockholders of the Holding Company with respect to the property of the Holding Company. The reorganization plan as approved and certified by the Interstate Commerce Commission and as approved and confirmed by the court provided in section K (R. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston and Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

Despite this clear and unequivocal language showing that the rights of the public holders of preferred stock of the Holding Company were not to be impaired in any way, and despite the fact that nothing was allowed in the New Haven reorganization by way of common claim or otherwise in connection with the New Haven's guaranty of the principal amount of the public preferred (R. 41), the court below stated that (R. 97):

> "Reading the plan of reorganization and the consummation decree together, we think that their combined effect was to reconstitute the reorganized New Haven the absolute owner of its shares of preferred stock in

> the Holding Company, that as such an owner it was to have all the rights accorded to those shares by St. 1910, c. 639, and that it was not thenceforth to be affected in any way by its earlier guaranty of the preferred shares sold to the public."

5. The court below, however, concluded that the reorganization proceedings did destroy the pre-existing prior rights of the public preferred. It is clear that under Section 77 of the Bankruptcy Act the reorganization court would have had no power to accomplish such a result had it attempted to do so. Under applicable decisions of this court, a Bankruptcy Court acting under Section 77 of the Bankruptcy Act has no power to alter the relative rights of two groups of stockholders of another corporation not then being reorganized, in property owned by that corporation. Section 77(a) gives the court in reorganization exclusive jurisdiction of the debtor and its property wherever located, but, as stated in *Callaway* v. *Benton*, 336 U.S. 132:

> "There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."

As stated in *Meyer* v. *Fleming*, 327 U.S. 161:

> ". . . the exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed."

In the *Callaway* case the Central of Georgia Railway Company was in reorganization under Section 77. Under the plan approved by the Interstate Commerce Commission and by the District Court, a lessor railroad, Southwestern Railroad Company, was given the alternative of selling its

property to the reorganized company or of having its lease disaffirmed. A dispute then arose between the two groups of stockholders of Southwestern as to whether under Georgia law a majority of the stockholders of Southwestern could vote to sell its property on the terms fixed in the plan of reorganization or whether a unanimous vote was necessary for that purpose. This dispute was taken to the Georgia courts. The Federal District Court in which the reorganization proceedings were pending granted a permanent injunction restraining further prosecution of the action in the State court. The Court of Appeals for the Fifth Circuit, however, reversed this order and its action was affirmed by this court, which, after referring to *Meyer* v. *Fleming, supra,* stated at page 148:

> "We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers not justified by any provisions of the Bankruptcy Act."

The court pointed out that in the New Haven reorganization a leased line, the Boston & Providence, was in reorganization in a Massachusetts District Court while the New Haven reorganization was proceeding in Connecticut. The plan of reorganization of the New Haven contemplated purchase of the property of the Boston & Providence. This court in the *Callaway* case stated at page 144:

> "Since the Boston & Providence reorganization court had exclusive jurisdiction of its property, it can hardly be contended that the New Haven reorganization court could assume exclusive jurisdiction to decide questions arising, for example, between different classes of creditors of the Boston & Providence as to whether the New Haven's offer should be accepted."

So, in the present case, the Federal District Court in Connecticut had no power to decide questions arising between different groups of stockholders of the Holding Company as to their relative rights in the stock of the Boston & Maine held by the Holding Company.

In reaching the conclusion it did, not only did the court below attribute to the New Haven reorganization proceedings an effect which the Connecticut District Court had no power to accomplish, but the court below in effect nullified a provision of a plan of reorganization approved and certified by the Interstate Commerce Commission and approved and confirmed by the court.

Where a right granted by the Bankruptcy Act is at issue, or where there is a question as to the effect of proceedings in bankruptcy and of a discharge granted therein, a Federal issue is raised. *Lesser* v. *Gray*, 236 U.S. 70. *Zavelo* v. *Reeves*, 227 U.S. 625. *Rector* v. *City Deposit Bank Co.*, 200 U.S. 405.

We submit that the court below erroneously decided a Federal question of substance and of importance in the administration of the Bankruptcy Act and of importance to the numerous holders of publicly preferred stock in a way not in accord with the applicable decisions of this court and the Bankruptcy Act itself.

II.

THE MASSACHUSETTS COURT DEPRIVED THE PUBLIC HOLDERS OF PREFERRED STOCK OF THE HOLDING COMPANY OF RIGHTS ACCORDED THEM BY DECREES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE ANTI-TRUST PROCEEDINGS.

As stated by the Interstate Commerce Commission in its decision dated February 18, 1941, a public document of

which the courts take notice (244 I.C.C. 239, at pp. 268, 269), "the publicly held shares were given the additional right of preference in any liquidation of the Holding Company to the preferred shares owned by the principal debtor [the New Haven] by the decree of the United States District Court for the Southern District of New York entered June 4, 1923, in the case of United States of America v. New York, New Haven & Hartford Railroad Company, et al."

A right claimed under the decree of a Federal court is a right "claimed under the constitution, treaties or statutes of, or commission or authority exercised under, the United States," and presents a Federal issue which gives this court jurisdiction under section 1257(3) of the Judicial Code. *Donohue* v. *Vosper,* 243 U.S. 59. *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33.

The 1914 consent decree provided for sale of the Holding Company's Boston & Maine stocks by trustees appointed thereunder, and liquidation of the Holding Company. The decree specifically provided that all sums due the holders of the public preferred of the Holding Company should be paid before payment of the balance to the New Haven (R. 65). The trustees appointed under the decree had not sold the Boston & Maine stocks, however, when in 1923 the New Haven filed its petition to amend the 1914 decree. In this petition the New Haven sought the return of the Holding Company stock then in the court's possession through its trustees. Presumably in order to get what it sought, and without opposition, the New Haven asked that its stock might be returned to it subject to the proviso that "the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Com-

pany held by the New York, New Haven & Hartford Railroad Company shall be in no manner diminished or impaired."

The New Haven got what it wanted in the return of its stock without opposition, and the publicly held stock got a decree or judgment of a court of competent jurisdiction giving it a right to a preference in any liquidation of the Holding Company. The provision for the protection of the public preferred was included in the decree in the form requested by the New Haven's petition, and the further requirement added that "The certificates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference" (R. 83). From this decree no appeal was taken. Pursuant thereto, the Holding Company caused an endorsement to be stamped on the certificates representing all of the public preferred which reads (R. 44 and 45):

> " 'The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others.' "

There can be no doubt that the New York District Court had the power to enter the decree it did. Any possible objection based on either lack of personal jurisdiction or venue was waived by the appearance of the New Haven and the Holding Company. *Merchants Heat & Light Co.* v. *J. B. Clow & Sons,* 204 U.S. 286. *Hill* v. *Mendenhall,* 21

Wall. 453. *Kendall* v. *United States,* 12 Pet. 524. *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.,* 260 U.S. 261. *Lee* v. *Chesapeake & Ohio Railway Co.,* 260 U.S. 653.

In proceedings under the Sherman Act the District Court in New York had ample power to divest the New Haven of its control over the Boston & Maine, exercised through its ownership of all the voting stock of the Holding Company (*Northern Securities Co.* v. *United States,* 193 U.S. 197; *United States* v. *Union Pacific Railroad Co.,* 226 U.S. 61; *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 77, 78; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 189, 190; *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461), and, having taken possession, through its trustees, of the New Haven's Holding Company stock, and of the assets of the Holding Company itself, the court in New York of necessity had power to make such orders as it felt were necessary for the protection of all concerned, when it determined to return to the New Haven its stock in the Holding Company.

Consequently there can be no doubt that the court had power to give the public preferred a priority over the New Haven's preferred quite apart from whether or not such priority would tend to prevent the continuance of monopolistic practices. This is particularly true where, as here, the court acted in accordance with a petition from the New Haven itself. Furthermore, the New York District Court may well have felt that a permanent priority in favor of the public preferred would minimize chances of the New Haven's using its Holding Company stock for illegal purposes, and that court may well have felt that such a priority would insure distribution of the Holding Company's Boston & Maine stock to others than the New Haven in the event of a subsequent liquidation of the Holding Company.

Under certain circumstances subordination of the claims of a parent in the assets of a subsidiary to claims of others is a proper remedy for violation of the anti-trust laws. *Columbia Gas & Electric Corp.* v. *United States,* 151 F. (2d) 461.

In any event, the 1914 decree was a consent decree, and the 1923 modification was likewise a decree in substance entered with the consent of the New Haven, since it was entered in the form requested by the New Haven's own petition. Even if the court in New York had erred, as it did not, in the form of its decree, such error would have been waived by the New Haven and cannot now be attacked. As stated in *Swift & Co.* v. *United States,* 276 U.S. 311, at 331: "The power to enjoin includes the power to enjoin too much."

Despite the foregoing considerations and despite the fact that both the New Haven petition and the 1923 decree entered thereon refer to priority "in any liquidation" of the Holding Company, the court below concluded that it was the intent of the 1923 decree merely to continue to recognize existing equitable rights, which the court below had erroneously concluded were cut off by the reorganization of the New Haven. As to this the court said (R. 98):

> "The purpose of both of the anti-trust decrees, we think, was to recognize, under the equitable principle discussed above, the priority accruing to the owners of the publicly held preferred stock by reason of the New Haven's guaranty. It was not their purpose to create a priority not theretofore existing. Rather they undertook to confirm and perpetuate a subsisting right. That right, as we have seen, fell when the guaranty was discharged. It is to be remembered that the decrees under consideration were entered in an anti-trust proceeding brought on the equity side of the court. Of

course, the Federal court possessed plenary power to put an end to an unlawful monopoly and to do all things that were necessary and proper to accomplish that result. *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 461. But it is one thing to recognize a priority already in existence and quite another to create one. It is difficult to see how the creation of a priority with respect to the publicly held preferred stock would have any legitimate place in anti-trust decrees of the sort here involved. The creation of such priority would have no tendency to put an end to the monopoly —the object of the proceeding—but would operate merely by way of punishment. If such had been the purpose of the decrees, serious questions (fol. 101) touching the power of the Federal court to enter such decrees would be presented. We do not interpret the decrees as attempting to accomplish that purpose. . . ."

As we have shown, there can be no question as to the power of the Federal court to enter the decree which it did under the circumstances here present. With respect to the words "in any liquidation," the court said at page 99 of the record:

"It would be giving undue weight to those words to construe them as conferring a priority after the foundation for the priority, namely, the guaranty, had been discharged in the reorganization proceedings. The decree did not mean that the priority was to exist 'in any liquidation' under any and all circumstances. At the time that the 1923 decree was entered the New Haven was presumably solvent and a discharge of the guaranty in bankruptcy or similar proceedings could hardly have been contemplated. The decree must be

read in the light of the conditions existing at the time it was entered."

As a matter of fact, in reaching the conclusion it did, the court ignored both the plain language of the 1923 decree and the conditions existing at the time. The Holding Company was wholly controlled by the New Haven. To say as the court did that in 1923 "The New Haven was presumably solvent and a discharge of the guaranty in bankruptcy or similar proceedings could hardly have been contemplated" is to fly in the face of conditions in the railroad industry at the time which were known to everyone and to ignore portents plainly visible at the time which subsequent events proved only too well justified. Priority in liquidation of the Holding Company would become of importance to the public preferred only in the event of the bankruptcy or reorganization of the New Haven, and it was priority under just such adverse circumstances which the New Haven offered the holders of public preferred when it filed its petition in 1923 and which the court accorded them by its decree and the subsequent stamping.

The result reached by the court below not only failed to give proper effect to the New York anti-trust decrees, but nullified a plan of reorganization which assumed that the New York decrees meant exactly what they said. As we have already pointed out, the plan of reorganization of the New Haven provided (R. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly

Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

In its supplemental report dated February 18, 1941, which modified in certain respects a plan previously approved, 244 I.C.C. 239, the Commission included a paragraph, pages 268 and 269, dealing with the Holding Company. After stating the facts as to the incorporation of the Holding Company and the issue of the preferred stock, the Commission said:

"The publicly held preferred shares were given the additional right of preference in any liquidation of the Holding Company to the preferred shares owned by the principal debtor by the decree of the United States District Court for the Southern District of New York entered June 4, 1923, in the case of United States of America v. New York, New Haven & Hartford Railroad Company et al."

The Commission then referred to certain requests of the principal debtor and of the protective committee for the public preferred and stated:

"The reasons underlying the provision for the disaffirmance of the principal debtor's guaranty of the stock are stated in the previous report. Such reasons, in our opinion, justify our previously stated conclusions, and we deny the request for the elimination of this provision. With respect to the protective committee's request that the plan should limit or terminate the principal debtor's ownership of the Holding Company's stock, we believe that this is a matter which

more properly should be determined by the court. The plan, however, should provide that the disaffirmance of the guaranty should not impair the lien of the publicly held preferred shares."

Thus it is clear that the Commission assumed that the public preferred was entitled to priority and provided for the insertion of the above-quoted clause for the express purpose of seeing that that right was in no way impaired by the reorganization of the New Haven.

The Bankruptcy Court confirmed the plan containing the provision as to the preferential rights of the publicly held preferred stock and its consummation order and final decree contained nothing, as heretofore pointed out, showing any intent on the court's part to deprive the publicly held stock of its preferential rights.

The failure of the court below to respect the rights accorded petitioner and other holders of public preferred by the anti-trust decrees presents a question of much importance which this court should review. The public preferred has been bought and sold since 1923 by members of the general investing public, bearing an endorsement, purporting to be on authority of a United States court, which any reasonable man would assume indicated an adjudicated priority good under all circumstances. The fact that the stock certificates were repeatedly stamped as they were permits only one inference, namely, that any purchaser would assume that he was buying a stock with a preference established by a court of competent jurisdiction. The Interstate Commerce Commission apparently entertained the same view. The Supreme Judicial Court, by an erroneous and unwarranted interpretation of the 1923 decree, based partly on an erroneous view as to the effect of the New Haven reorganization, has destroyed those rights,

and it is important that these errors be corrected, not only for the protection of the present public holders of Holding Company preferred, but for the guidance of other courts which may be faced with issues as to the powers of the Federal courts in anti-trust cases and as to the effect of consummation orders and final decrees in bankruptcy reorganizations.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HUGH D. McLELLAN,
Attorney for Petitioner,
THE DELAWARE AND HUDSON COMPANY.

Of Counsel:
HENRY V. ATHERTON.

APPENDIX.

Statute 1909, Chapter 519.

"AN ACT TO INCORPORATE THE BOSTON RAILROAD HOLDING COMPANY.

"*Be it enacted, etc., as follows:*

"SECTION 1. Walter C. Baylies, Robert M. Burnett, Frederic C. Dumaine, their associates and successors, are hereby made a corporation by the name of the Boston Railroad Holding Company, for the sole purpose of acquiring and holding the whole or any part of the capital stock, bonds and other evidences of indebtedness of the Boston and Maine Railroad, and of voting upon all certificates of stock so acquired and held, and of receiving and collecting dividends and interest upon said stock, bonds and other evidences of indebtednesss; and for said purpose said corporation shall have the powers and privileges and be subject to the liabilities, duties and provisions contained in sections two, three, four, six, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, seventy-one, seventy-two, seventy-three, seventy-four, seventy-six, seventy-seven, seventy-eight, seventy-nine, eighty-one, eighty-two, eighty-three, eighty-four, eighty-five, eighty-six, eighty-seven, eighty-eight, eighty-nine and ninety of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and acts in amendment thereof and in addition thereto, so far as said sections and acts are not inconsistent with the provisions of this act.

"SECTION 2. The capital stock of said corporation shall be one hundred thousand dollars, divided into shares of one hundred dollars each, and said corporation may, at a meeting duly called for the purpose, by a vote of a majority of all its stock, authorize an increase or reduction of its capital stock in the manner provided by sections forty and forty-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three: *provided*, that such increase or reduction shall be approved by the board of railroad commissioners. A majority of the officers and directors of the Boston and Maine Railroad and of said corporation shall be citizens of Massachusetts, and the principal offices and places of business of said corporations shall be in the city of Boston, in said commonwealth, and all meetings of the directors of said corporations shall be held in this commonwealth.

"SECTION 3. The stock of the Boston and Maine Railroad which may be acquired by said Boston Railroad Holding Company shall not be sold by it without express authority from the legislature; and any proposed sale thereof shall be reported to the board of railroad commissioners, who shall investigate and report to the legislature respecting the advisability or expediency of such sale. The bonds, notes or other evidences of indebtedness of the Boston and Maine Railroad which may be acquired by said Boston Railroad Holding Company shall not be sold, transferred, pledged or otherwise disposed of without the approval of the board of railroad commissioners, but this provision shall not be construed so as to impair the rights of creditors of said Boston Railroad Holding Company to secure payment of any indebtedness due them.

"SECTION 4. Any railroad corporation incorporated at the date of the passage of this act under the laws of this commonwealth may guarantee the principal of and the dividends and interest upon the capital stock, bonds, notes

and other evidences of indebtedness of said Boston Railroad Holding Company, and may acquire and hold said stock, bonds, notes and other evidences of indebtedness: *provided, however,* that the shares of stock of said Boston Railroad Holding Company shall not be sold or transferable until said stock has been guaranteed as hereinbefore provided. Any railroad corporation acquiring said stock as hereinbefore provided shall not thereafter sell the same without the express authority of the legislature. The commonwealth may at any time by act of the legislature, upon one year's notice, take or acquire by purchase or otherwise the stock, bonds, notes and other evidences of indebtedness issued by the said Boston Railroad Holding Company; *provided, however,* that such taking or purchase shall include all said securities of said company; and upon motion of the attorney-general, the compensation to be paid therefor shall be determined in the manner provided in section seven of Part II of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six. In the event of such taking the commonwealth shall secure any corporation from which stock, bonds, notes or other evidences of indebtedness are taken against any liability arising by reason of its having guaranteed the principal thereof and the dividends and interest thereon under authority of this act. The acquisition by any railroad corporation, as hereinbefore provided, of any of the stock, bonds, notes or other evidences of indebtedness of said Boston Railroad Holding Company shall be deemed to be an acceptance by such railroad corporation of all of the terms and provisions of this act.

"SECTION 5. This act shall take effect upon its passage.

"*Approved June 18, 1909.*"

Statute 1910, Chapter 639.

"AN ACT RELATIVE TO THE ISSUE OF PREFERRED STOCK BY THE BOSTON RAILROAD HOLDING COMPANY.

"*Be it enacted, etc., as follows:*

"SECTION 1. The Boston Railroad Holding Company may, by a vote of a majority in interest of its common or general stockholders at a meeting called for that purpose, issue preferred stock, and from time to time increase the amount thereof, divided into shares of the par value of one hundred dollars each: *provided*, that the amount of such issue and of every such increase shall be approved by the board of railroad commissioners. The holders of such preferred stock shall, in preference and priority over all other stock of the corporation, be entitled, upon dissolution of the corporation or in liquidation of its affairs, or in case of a default in the payment of any stipulated dividend on said preferred stock, to payment of the par value thereof and accrued dividends thereon, and shall further be entitled to semi-annual dividends, to be paid out of the net profits of the corporation, at a rate to be approved by the board of railroad commissioners, but not to exceed, however, five per cent per annum, which dividends shall be cumulative. Said preferred stock shall not be entitled to participate in any increase or issue of new stock, common or preferred, which may be made by said corporation, shall not have any voting power, shall not be counted with the common stock in questions of majorities and quorum, and shall be subject to such other restrictions, qualifications and limitations and entitled to such other privileges and priorities, not inconsistent with the provisions of this act, as shall be approved by the board of railroad commissioners on petition of said Boston Railroad Holding Company.

"SECTION 2. Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock, to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company.

"SECTION 3. If authority to sell the shares of Boston and Maine Railroad, as provided for by section three of chapter five hundred and nineteen of the acts of the year nineteen hundred and nine, shall be granted by the general court, the Boston Railroad Holding Company may forthwith retire and cancel its preferred shares upon paying the holders thereof compensation determined as provided in section seven of Part II of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, but not less than the par value thereof and accrued dividends thereon, and after thirty days from the commencing of proceedings for such determination the supreme judicial court shall have jurisdiction therein to authorize the sale of said Boston and Maine Railroad stock free from the lien of the holders of said Boston Railroad Holding Company preferred stock, upon such terms securing the rights of said holders as the court shall find to be just and reasonable.

"SECTION 4. Subject to the reserved right of the commonwealth, under section four of chapter five hundred and nineteen of the acts of the year nineteen hundred and nine to take or acquire, by purchase or otherwise, the said preferred stock of the Boston Railroad Holding Company, the holders of a majority thereof may, in case of a default in the payment of any semi-annual dividend upon such pre-

ferred stock, apply in person or by attorney to the supreme judicial court for an order for the sale of said Boston and Maine Railroad stock, and said court may make such order as in its discretion justice and equity shall require for the enforcement of the lien of said preferred stock upon said Boston and Maine Railroad stock, and the same shall be sold in accordance with the terms of such order unless prior to such sale the dividend in default, and the amount of any subsequently defaulted dividends, shall be paid by said Boston Railroad Holding Company upon all its outstanding preferred stock; but no decree for a sale shall be made until the court shall be satisfied that the general court has had a sufficient opportunity to determine whether it will exercise the privilege to purchase the securities of the Boston Railroad Holding Company secured to it by section four of said chapter five hundred and nineteen. In case of any such sale, the proceeds thereof shall be applied, after payment of expenses of the sale—first, to the discharge of any claims which existed prior to the date of the meeting at which any of such preferred stock was first authorized; second, to the payment of all accrued and unpaid dividends to which, by the terms of this act, such preferred stock was entitled to the date of said sale; third, to the payment in full, or if said proceeds are insufficient therefor then to the equal pro rata partial payment, of the par value of said preferred stock, and the balance, if any, of the proceeds shall be paid to said Boston Railroad Holding Company.

"Section 5. Any railroad corporation owning any of the common stock of said Boston Railroad Holding Company may acquire, hold, own and sell any of the preferred stock authorized by this act, and may guarantee the payment of the stipulated dividends thereon, and of the par value thereof in case of liquidation or distribution of said Boston Railroad Holding Company, and of any deficiency

resulting from a sale under the provisions of the preceding section of this act.

"SECTION 6. This act shall take effect upon its passage.

"Approved June 15, 1910."

Statute 1946, Chapter 518.

"AN ACT TO DISSOLVE BOSTON RAILROAD HOLDING COMPANY.

"Be it enacted, etc., as follows:

"SECTION 1. Boston Railroad Holding Company, organized under chapter five hundred and nineteen of the acts of nineteen hundred and nine, as amended, is hereby dissolved and its corporate existence is hereby terminated and annulled, subject to the provisions of section fifty-one of chapter one hundred and fifty-five of the General Laws, and subject to the other provisions hereof; provided, that the applicable provisions of section three of this act shall not apply if the holder of all the common stock of Boston Railroad Holding Company shall, on or before July first nineteen hundred and forty-seven, transfer to Boston and Maine Railroad Company or its nominee, all of such stock; and provided, further, that in the event of such transfer, the holder of a majority of the preferred stock of Boston Railroad Holding Company shall, on or before July first, nineteen hundred and forty-eight, upon the basis of defaults in the payment of semi-annual dividends which have occurred prior to the effective date of this act, apply in person or by attorney to the supreme judicial court for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company which may, at the time of such application, comprise the assets of Boston Railroad Holding Company, in the manner and as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and

chapter six hundred and thirty-nine of the acts of nineteen hundred and ten except as they may be modified by the provisions of this act.

"SECTION 2. Nothing in this act shall be construed to affect any suit now pending by or against said corporation or any suits now pending or hereafter brought for any liability now existing against the stockholders or officers of said corporation.

"SECTION 3. If the holder of all the common stock of Boston Railroad Holding Company shall not on or before July first nineteen hundred and forty-seven transfer such stock to Boston and Maine Railroad Company or its nominee as provided in section one, or if, such transfer having been made, the holder or holders of a majority of the preferred stock of Boston Railroad Holding Company shall not have petitioned the supreme judicial court on or before July first, nineteen hundred and forty-eight, for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company in the manner and subject to the conditions as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and said chapter six hundred and thirty-nine of the acts of nineteen hundred and ten, then and in either of those events the supreme judicial court, upon application of the attorney general on behalf of the commonwealth, or upon application of a creditor or stockholder of Boston Railroad Holding Company, shall appoint a receiver to take charge of the estate and effects of said corporation and to collect the debts and property due and belonging to it, with power to prosecute and defend suits in its name or otherwise, to appoint agents under him and to do all other acts which might be done by said corporation, if in being, which may be necessary for the final settlement of its unfinished business. If such application is not made by the attorney general, the commonwealth

shall be made a party to such proceedings. The powers of such receiver and the existence of said corporation may be continued only so long as the court finds necessary for said purposes. Said receiver shall have the right to vote the stock of Boston and Maine Railroad.

"SECTION 4. Nothing in this act shall affect the rights of the holders of the publicly held or other preferred stock of Boston Railroad Holding Company, or the lien or liens or priority or priorities, existing in favor of such stock or any thereof. Said receiver shall distribute the assets in accordance with the rights of the respective parties in interest as determined by the court. Said distribution may be made by a sale of the assets of Boston Railroad Holding Company (including stock of Boston and Maine Railroad) and the distribution of cash, or by the distribution of such assets in kind; provided, that no distribution or sale of said stock of Boston and Maine Railroad shall be made pursuant to this act unless there shall have been furnished to the court by the department of public utilities satisfactory evidence showing that no distributee or purchaser (other than Boston and Maine Railroad) shall hold stock carrying more than five per cent of the total vote to which shareholders of Boston and Maine Railroad are then entitled; and provided, further, that no such sale or distribution shall be made before May first, nineteen hundred and forty-eight, except pursuant to a plan of liquidation approved by a majority of each class of stock (including as a separate class the publicly held preferred stock if the court shall determine that such preferred has rights differing from the rights of the other preferred) of Boston Railroad Holding Company, and approved by the court as fair and equitable. A plan of liquidation may be presented by any creditor or stockholder of Boston Railroad Holding Company, or by the receiver, or by the attorney general of the commonwealth.

"SECTION 5. Boston Railroad Holding Company is hereby prohibited from borrowing any money for the purpose of acquiring any of its preferred or common stock.

"SECTION 6. Nothing in this act shall be construed to relieve the person who was the treasurer or assistant treasurer, or in his absence or incapacity who was any other principal officer, of said corporation from the obligation to make such tax returns in the current year as are required by law, and the tax liability of said corporation shall be determined in accordance with the law of the commonwealth on the effective date of this act.

"Approved June 11, 1946."

United States Bankruptcy Act (Title 11, U.S.C., § 205).

"(f) Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to

the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities

issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section."

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Supreme Court of the United States.

October Term, 1951.

No. 567.

THE DELAWARE AND HUDSON COMPANY,
Petitioner,

v.

BOSTON RAILROAD HOLDING COMPANY ET AL.

BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

The facts are adequately stated in the petition and there is no occasion to discuss them in detail. However, it may be helpful to sketch precisely what the situation is and how it came about.

The New Haven and the Commonwealth of Massachusetts were at odds over whether the New Haven might control the Boston and Maine. Their differences were composed by the incorporation of the Holding Company by special act (St. 1909, c. 519) with a unique corporate structure made more unusual by the amendment of the following year (St. 1910, c. 639), the conveyance of the controlling block of Boston and Maine stock to the Holding

Company, and the issue of the Holding Company's own stock, both common and preferred, to the New Haven. The preferred stock constituted a single class and was given a lien on all the Holding Company's Boston and Maine securities. The New Haven sold some of the preferred stock which it had purchased and in conformity with the statutory requirement guaranteed both dividends and face of that which it sold.

Each share of the preferred, both those shares retained by the New Haven and those which it sold, was secured by the statutory lien. *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591. The Supreme Judicial Court has held that the result of the guaranty made by the New Haven was to subordinate its interest in the common security to the interests of the other preferred shareholders to whom the guaranty ran (see Rec. pp. 95, 96). The petitioner argues that this determination is binding on this Court under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (Petition, p. 17), and we agree.

Shortly after the sale of the preferred stock, the United States brought a bill in equity against the New Haven, the Holding Company and others in the District Court for the Southern District of New York to restrain alleged violations of the Sherman Act. The New Haven's control of the Boston and Maine through its ownership of the Holding Company, all pursuant to St. 1909, c. 519, and St. 1910, c. 639, was one of the alleged violations. That suit was concluded by a consent decree entered in 1914, which, as far as is presently material, required the New Haven to transfer its common and preferred stock in the Holding Company to trustees upon trusts established by the decree. Those trusts required the trustees to cause the sale of the Boston and Maine securities of the Holding Company and then to liquidate the Holding Company. This was to be done by the trustees in their capacity as control-

ling stockholders of the Holding Company. On liquidation they were directed to distribute the proceeds, first, in payment of their own expenses and of debts of the Holding Company; second, to the holders of the preferred stock carrying the guaranty to the amount of its face and accrued dividends; and, third, to the New Haven. They were given power to subordinate the statutory lien on the Boston and Maine securities attaching to the preferred shares received by them from the New Haven to that attaching to the shares which had been guaranteed—but this was no more than a power and it was never exercised.

The sale of the Boston and Maine securities was never made and the trustees took no steps to liquidate the Holding Company, and in 1923, at the instance of the New Haven, the court amended the 1914 decree by striking out all of its provisions relating to the Holding Company—subject, however, to the proviso that "the right attaching to" the preferred stock of holders like the petitioner "to be preferred in any liquidation . . . to the remaining shares of . . . preferred stock . . . shall in no manner be diminished or impaired," and that the certificates should be "stamped as entitled to such preference."

The certificates for the stock were stamped as so directed. No amendment was made to either St. 1909, c. 519, or St. 1910, c. 639. The Supreme Judicial Court held that this proviso did no more than reaffirm that preference in liquidation of the Holding Company which the guaranteed preferred shares already had over the remaining preferred shares arising out of the guaranty and dependent upon its continuance in force.

In 1935 the New Haven went into bankruptcy in the District Court for the District of Connecticut. In due course a claim was filed on the guaranty and a protective committee for the holders of guaranteed Holding Company preferred stock was formed. The committee laboured

manfully in the reorganization proceedings to preserve the guaranty and otherwise to advance the interests of its depositors. But by 1944 the Interstate Commerce Commission had directed disaffirmance of the guaranty. The committee (which had represented some 19,000 guaranteed preferred shares) then dissolved and the petitioner acquired most of its 10,000 shares from those theretofore represented by the committee.

The focus of the endeavour on behalf of the guaranteed stock then shifted from the reorganization proceedings to the Massachusetts legislature, with the result that St. 1946, c. 518, dissolving the Holding Company was passed and the present receivership initiated. The receiver was appointed in 1949.

Meanwhile, the bankruptcy reorganization was terminated by decree of the Connecticut District Court on September 11, 1947. The Supreme Judicial Court held that the discharge contained in that decree terminated the guaranty and that with the guaranty the right of the petitioner and the other holders of guaranteed stock to be preferred to the New Haven as the holder of preferred stock not guaranteed fell. That is the occasion for the present petition.

There are, consequently, three holdings by the Supreme Judicial Court which are pertinent: first, that the subsisting guaranty required subordination of the lien of the New Haven's preferred to that of the guaranteed preferred; second, that the bankruptcy decree destroyed that subordination when it destroyed the guaranty; and third, that the 1923 decree created no rights which did not exist before it was entered. The petitioner relies upon the first holding as its basis for attacking the second as federal error. It likewise attacks the third.

NO SUBSTANTIAL FEDERAL QUESTION ARISES FROM THE CONSTRUCTION PLACED ON THE BANKRUPTCY DECREE.

The respondent relied successfully upon the discharge contained in the bankruptcy decree. Since the decree was effective only because of a statute of the United States (§ 77(f) of the Bankruptcy Act, U.S.C. Tit. 11, § 205(b)), the second holding of the Supreme Judicial Court comes within the wording of U.S.C. Tit. 28, § 1257(3), but there is no substance in the point to move this Court to grant the writ. The petitioner does not assert that any error was committed in the bankruptcy court or that the guaranty as such was not discharged by the bankruptcy decree. It could not make such an assertion if it would. All that the state court held with reference to the bankruptcy decree was that it destroyed the guaranty. Granting (without conceding) that that construction raises a federal question, it is so patently right that it is quite without substance. A pre-1916 writ of error based upon it must have been dismissed as frivolous. Petitioner's point here is not that the construction of the decree as discharging the guaranty is wrong, but that the first holding of the Supreme Judicial Court, that the subordination consequent on the guaranty would not survive the guaranty was wrong —and that, right or wrong, is a question of state law.

The portion of the opinion establishing the subordination of the lien consequent on the guaranty appears at pages 95 and 96 of the record and is quoted at page 16 of the petition. On the next page the petitioner affirmatively states it is state law and warns this Court off with the citation of the *Tompkins* case. It is true that the passage quoted deals only with the birth of the right to subordination, but if state law sired the right, state law likewise determines the span of its life. The Supreme Judicial Court held that the continued life of the subordination required

the continued life of the guaranty, and the guaranty died on the entry of the bankruptcy decree.

The flaw in the petitioner's argument is made apparent by the statement at page 18 of the petition:

> "The court thus stressed those provisions of the final decree which revested in the reorganized New Haven its property free and clear of all claims, liens and encumbrances of creditors of the New Haven. In doing so the court completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock. Rather it is a right to priority in liquidation of the Boston and Maine stock owned by the Holding Company, never a debtor in the reorganization of the New Haven. The rights asserted by your petitioner are rights in property of the Holding Company, not in property of the New Haven."

In this statement the petitioner tacitly acknowledges the necessity of its case—that it must show a right within the corporate structure of the Holding Company rather than a right against the New Haven based upon the New Haven's guaranty—but it misstates the holding of the Supreme Judicial Court on which it does and must rely.

The rule of state law accepted by the Supreme Judicial Court at the petitioner's instance was that, "if the guarantor were to share in the proceeds of the security before the holders of the guaranteed obligations have been paid, he would be derogating from his guaranty" (Rec. p. 16). The "security" here was the statutory lien on the Boston and Maine stock which the Supreme Judicial Court had held in the *Hurley* case (315 Mass. 591) attached to all shares alike, and that lien has not yet been discharged. The assets subject to it are now being marshalled by the Supreme Judicial Court. If there were still a guaranty, a direction to the receiver to pay any of the proceeds to the

New Haven before all guaranteed stock had been paid in full would, under the language just quoted, constitute a derogation from the guaranty. But if the guaranty had gone, there could be nothing from which to derogate. The fashion in which the guaranty was terminated is immaterial. As it happened, it was terminated by the bankruptcy discharge, but the result would have been the same had it been terminated by a release.

The important point which the Supreme Judicial Court had steadily in mind, but which the petitioner, understandably, does not emphasize, is that the rule of law requiring subordination is one which establishes rights as between two persons having, save for the effect of the obligation of the collateral guaranty of one, common security rights in the property of a third. The rule, solely by reason of the operation of the guaranty, gives one of two tenants in common of a single first mortgage preference over his fellow. It has nothing to do with the relative claims of a first mortgagee against a second mortgagee—who are not fellows at all. Where there are two mortgages, a first and a second, the first has priority because the mortgagor's deed has given the second only a junior right. The second mortgagee has in no way subordinated himself permanently or temporarily to the first. The mortgagor did it for him. But where there is a single mortgage of which our two hypothetical lienors are holders in common, there is subordination only through the act of one of the two, and he can make the subordination permanent or temporary according to how he draws his deed. The "deed" here was the implication raised by law from the guaranty. The law was the law of Massachusetts, and the Supreme Judicial Court of Massachusetts says that the term granted by that "deed" was the term of the guaranty. The habendum was not in fee; it was a "so long as" estate, a determinable fee —here so long as the guaranty remained in force.

To avoid this, the petitioner asserts that the Supreme Judicial Court "completely overlooked the fact that the right asserted by your petitioner was not a claim, lien or encumbrance on the New Haven's preferred stock" (Petition, p. 18), but rather a true preference residing in the corporate structure of the Holding Company. The Supreme Judicial Court overlooked nothing. It *held* that the claim to subordination which it recognized on the authority of the cases cited by the petitioner *was* "a claim, lien or encumbrance on the New Haven's preferred stock" and was *not* a preferential right running from the Holding Company to the petitioner.

As far as the bankruptcy decree went the Supreme Judicial Court in no fashion held that it varied in any particular the right which any stockholder, preferred or common, guaranteed or not, had in 1911, in 1923, or on September 10, 1947, against the Holding Company. It had already held in *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591, that the lien on the Boston and Maine stock attached to all of the Holding Company preferred; it did hold in its current opinion that the rule advanced by the petitioner required that, *so long as the guaranty was outstanding*, the New Haven must defer its claim to share in the proceeds of the Boston and Maine stock to those of the preferred stockholders whose shares it had guaranteed, and it did hold that the bankruptcy decree discharged the guaranty and carried the Holding Company preferred to the reorganized company free of pre-existing encumbrances. But that was all. It did not hold that the bankruptcy decree in any way touched obligations of the Holding Company, which was not a party to the bankruptcy case, running either to the petitioner or to the respondent.

As far as federal law is concerned, the utmost limit of the holding is that the bankruptcy decree put an end to the guaranty and to any encumbrance on the New Haven's pre-

ferred stock in the Holding Company. Even the petitioner does not dispute that to have been so.

THE 1923 DECREE ACCOMPLISHED NO CHANGE IN THE CORPORATE STRUCTURE OF THE HOLDING COMPANY.

The petitioner therefore argues that its asserted right to be preferred runs not against the New Haven but against the Holding Company itself; in other words, that it is a true preference created within the corporate structure of the issuer of the security. But the 1923 decree neither did nor could vary the corporate structure of the Holding Company.

What classes of stock there may be within a corporation and what their relative preferences are to be depends entirely upon the provisions of the "charter" of the corporation. In the case of the Holding Company that "charter" was the two statutes St. 1909, c. 519, and St. 1910, c. 639. Those statutes established two classes of stock only, common and preferred. There was only one authority which could amend that "charter" and establish a third class of stock, and that was the Massachusetts legislature.

The District Court for the Southern District of New York had plenary power to require all persons before it to do all things necessary to put an end to a violation of the Sherman Act and, by way of prophylactic justice, to prevent any recurrence. But it could not directly amend a statute passed by the Massachusetts legislature or otherwise directly vary the stature of a corporation erected by that legislature. The petitioner cites several cases from this Court (see Petition, p. 26) to the effect that divestment of control over subsidiaries is an appropriate item for inclusion in the decree in an anti-trust case. That is perfectly true, but the decree in each of those cases was limited

to an injunction directing action by stockholders to accomplish the desired divestment. In no instance was there any attempt directly to vary the capital structure of any corporation. In *Columbia Gas & Electric Corp.* v. *United States,* 151 F. (2d) 461 (cited at p. 27), the decree was by a reorganization court which clearly did have powers over the assets behind the securities.

This was the same pattern which the District Court for the Southern District of New York adopted in the 1914 decree. The petitioner suggests that it had taken possession "of the assets of the Holding Company itself" (Petition, p. 26), but that goes one step, and a vital step, beyond the facts. What that court did do was to cause the New Haven, through the coercion of its injunctive power, to place the New Haven's stock in the Holding Company in the hands of the court's trustees, and then, through its directions to its trustees, to direct them through the exercise, by them as individuals, of their voting power to deal with the assets of the Holding Company to the satisfaction of the court. There is a fundamental distinction here. In no particular in the 1914 decree did the court attempt itself directly to do anything either to the capital structure of the Holding Company or to its assets. It followed precisely the same *modus operandi* which this Court had approved in the *Northern Securities* case (193 U.S. 197), the *Standard Oil* case (221 U.S. 1), and the *Union Pacific* case (226 U.S. 61), and was later to approve in the *Ethyl* and *Crescent* cases (309 U.S. 436, and 323 U.S. 173), all relied on by the petitioner. All it did was to require the New Haven to turn over its stock and then to empower the grantee-trustees, through the voting rights inhering in the stock, to vary the capital structure of the Holding Company through release or subordination of the statutory lien in their discretion—powers which were never exercised.

When it undid in 1923 what it had done in 1914, the Supreme Judicial Court held it did not attempt to go further. It is hard to see what other construction could have been adopted. The words on which the petitioner relies are in a provision limiting the effect of the dispositive words which precede them. It would be completely novel to have an entirely new right created by a limiting proviso. The dispositive words were those striking out the portions of the 1914 decree dealing with the Holding Company stock and the proviso was "excepting that the right . . . to be preferred . . . shall in no manner be diminished or impaired . . ." (Rec. p. 83). As matter of language, the exception must relate to an existing situation, not one newly created by the negative of an exception. The negative pregnant is the ineptitude of a pleader; it has no place in the decree of an astute court. And no negative could be sufficiently pregnant to produce the monstrosity which the petitioner seeks to find.

All of this leads to the underlying question of whether this exercise of construction presents a federal question worthy of the consideration of this Court. It is true that the petitioner claims that on its construction its stock which had been issued in 1910 as ordinary preferred stock had been made a prior preferred stock by the 1923 decree, and so makes a claim "under . . . authority exercised under, the United States," within the language of U.S.C. Tit. 28, § 1257(3). But it is likewise true that the Holding Company in 1923 was a Massachusetts corporation, the creature of the Massachusetts legislature, and its corporate structure could only be varied by the operation of Massachusetts law. The Massachusetts court has held that its corporate structure was not varied, and it did so in discharge of a special jurisdiction specially delegated to it by the Massachusetts legislature which had first fashioned that corporate structure.

The Supreme Judicial Court was the sole forum in which under St. 1910, c. 639, the statutory lien could by the terms of the statute be enforced. Before 1946, on a petition seeking foreclosure of the lien, it had held that the guaranteed stock could not enforce the lien except with the concurrence of enough of the remaining stock to constitute a majority—in other words, that there was no class of prior preferred, but only a single class of preferred, comprising both that which was guaranteed and that which was not. *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591. That decision was, of course, known to the legislature, and if it misstated the legislative will, it could easily have been rectified. But the legislature passed no statute declaring the case to be wrong. On the contrary when it passed St. 1946, c. 518, under which this proceeding is brought, it specifically referred to the Supreme Judicial Court the question of relative preference.

The jurisdiction of the Supreme Judicial Court over the liquidation of the Holding Company is a statutory jurisdiction. The statute contained most unusual provisions as to how that liquidation was to be accomplished, among which was one for a plan "approved by a majority of each class of stock (including as a separate class the publicly held preferred stock if the court shall determine that such preferred has rights differing from the rights of the other preferred)." St. 1946, c. 518, § 4. The parenthetical phrase was the invitation which spurred the petitioner to bring its petition in the Supreme Judicial Court in the first instance. Far from recognizing that any change in the corporate structure had been effected, the legislature referred the question to the Supreme Judicial Court, which answered that there had been none.

It is hard to conceive of a question more completely within the field of state law than that of how the structure of a creature of the state legislature shall be changed. Yet

that is the question which the present petition asks this Court to pass upon. We submit that in its discretion it should refuse to do so.

The petitioner cannot avoid this by suggesting that the asserted change in the corporate structure of the Holding Company was accomplished, not by the 1921 decree *perpetua vigore*, but by the stamping in conformity with the order of the decree. The Supreme Judicial Court did hold that the stamping did not give a preference, contrary to the petitioner's earnest argument, but that holding may not be reviewed by this Court. When the petitioner claims under the act of the corporation it is not claiming "under . . . authority exercised under, the United States," and U.S.C., Tit. 28, § 1257, gives no jurisdiction to review.

As a matter of discretion this Court should deny the petition.

This case is unique. There never have been and probably never will be again preferred stock clauses like those contained in St. 1910, c. 639. The provisions of St. 1916, c. 318, are likewise unique. There can be no occasion to grant the writ in order to settle an unsettled state of the law as a guide to litigants in future litigation—both because the law is not unsettled and because there is no probability that there will ever be any similar litigation in the future. There is no conflict between the holding of the Supreme Judicial Court and any opinion of this Court which requires resolution. In the exercise of its discretion, this Court functions as a statesman as well as a judge. If the issues presented are not sufficient to move the statesman, who must keep his eye and mind on broad issues, it is not enough that they might suffice to move the judge, who looks only to declaring the rights of the parties before him. The best recent statement is that of the Chief Justice

quoted in Stern and Gressman, Supreme Court Practice, at page 98:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the . . . Court is . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill [our] responsibilities . . . To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

The only conflict with any decision of this Court asserted by the petitioner is with *Zavelo* v. *Reeves*, 227 U.S. 625, 629 (Petition, p. 19). There is no conflict. That case held that the familiar rule that a moral obligation which will supply the place of consideration and support a subsequent promise to pay persists after a discharge in bankruptcy, and that the subsequent promise may be made during the pendency of the bankruptcy proceedings. (The first authority which the Court cited was from Meeson and Welsby.) The Supreme Judicial Court held that a subordination consequent on the guaranty would not survive the bankruptcy discharge on the asserted theory that the discharge operated only to end the remedy to enforce the guaranty rather than the obligation of the guaranty. Since there was no new promise which could revitalize the obligation under

the rule recognized in *Zavelo* v. *Reeves*, there was no possible conflict. The nearest thing to a conflict with that rule was the quotation from *"The Western Maid,"* 257 U.S. 419, which is in the reports of this Court.

As far as bankruptcy practice is concerned, there is nothing in the least novel. The petitioner does not dispute that the bankruptcy ended the guaranty as such. The respondent never claimed that the bankruptcy in any way affected any obligation of the Holding Company to the petitioner or to any preferred stockholder. The Supreme Judicial Court did not go beyond the respondent's claims. And the bankruptcy court itself recognized that it was not disturbing any preferences within the Holding Company's corporate structure. So that there can be no misconception on this point, we print an unreported opinion of Judge Hincks in the bankruptcy case, which was cited to the Supreme Judicial Court, as an appendix to this brief.

Neither is there any point of general interest in the antitrust decrees. That of 1914 followed the conventional pattern. That of 1923 was unusual only because of the proviso which patently was included only out of an abundance of caution. The Supreme Judicial Court in no way disregarded the validity of the decree. It merely construed its words and concluded they would not support the petitioner's claim. The one judge who disagreed (Counihan, J.) did not see fit to state his reasons. We submit that we have shown that the court's construction was right, but even if it was wrong, it raises no point of general interest.

Finally, on this point, the dismissal by this Court (336 U.S. 932) of the appeal of the present respondent and of the Holding Company from the earlier decision of the Supreme Judicial Court in this same proceeding is not without pertinence. On that appeal the appellants sought to show that the statute under which the present petition is brought (St. 1946, c. 518) offended against the obligation

of contract clause of the Constitution. Whether it did or not depended wholly upon the correct construction of St. 1909, c. 519, and St. 1910, c. 639. The Supreme Judicial Court had so construed them that there was no violation. We challenged that construction. This Court dismissed our appeal on the jurisdictional statement for want of a substantial federal question. It is, of course, true that such a dismissal does not constitute a binding precedent on which we can rely, but it is also true that the federal question presented on the present record is no more substantial.

We ask the Court to deny the petition.

Respectfully submitted,

JOHN L. HALL,

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Attorneys for the Respondent.

Appendix

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization
of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 16562

MEMORANDUM OF DECISION ON PETITION FOR ORDER 570

The Boston Holding Company was incorporated in Massachusetts under the Special Act of June 18, 1909 "for the sole purpose of acquiring and holding the whole or any part of the capital stock, bonds and other evidences of indebtedness of the Boston and Maine Railroad, and of voting upon all certificates of stock so acquired and held, and of receiving and collecting dividends and interest upon said stock, bonds and other evidences of indebtedness." This Act (Sec. 2) authorized the issue only of common stock (originally $100,000): no provision was made therein for the issue of preferred stock.

By the Special Act of June 15, 1910 the Holding Company was authorized to issue preferred stock.

In conformity with these two Acts the New York, New Haven and Hartford Railroad Company acquired and still holds all of the common stock of the Holding Company.

The New Haven also, in accordance with said statutes, acquired and still holds 244,933 shares of Holding Company preferred stock. In addition, prior to September 22, 1906, there were outstanding in the hands of the public 28,000 shares of preferred stock which pursuant to the provisions of the Acts just referred to had been originally acquired by the New Haven for full value and on their sale had been guaranteed by the New Haven as to principal ($100. par) and dividends. Of these guaranteed shares the New Haven purchased 3,850 shares, of which it later sold to the Holding Company 1,030 shares. As a result of these transactions, the 28,000 shares guaranteed by the New Haven, which at one time were outstanding, are held now 2,820 by the New Haven estate, 1,030 in the treasury of the Holding Company and 24,150 by the general public.

For many years during which dividends were suspended on the stock of the Boston and Maine, the New Haven by virtue of its guaranty provided the funds for the payment of the stipulated four per cent dividend on the preferred stock of the Holding Company. Two such payments were made after the institution of these proceedings. However, beginning with the dividend due January 10, 1938, the New Haven trustees discontinued payments under the guaranty, and under a plan of reorganization for the New Haven proposed by the Interstate Commerce Commission and approved by the court by order entered as of even date herewith, the New Haven's guaranty of said preferred stock was permanently rejected. Thus the guaranteed dividends on the cumulative preferred stock of the Holding Company have been in default since January, 1938. And the approved plan operates as a final breach of the guaranty relieving the New Haven estate of obligation (a) to pay all dividends heretofore accrued and hereafter accruing on the guaranteed stock and (b) the par value thereof to the holders of said stock. For this breach of guaranty

the holders of the guaranteed stock under Sec. 77 of the Bankruptcy Act are entitled to claim in damages against the New Haven estate,—a claim which under the approved plan of reorganization will be discharged, when adjudicated, in a proportionate share of the new common stock of the New Haven.

The pending petition is brought by a committee of holders of the guaranteed preferred stock of the Holding Company who pray that the New Haven trustees be ordered to surrender the 247,759 preferred shares of the Holding Company in the New Haven estate. If this were accomplished the preferred stock which is publicly held would constitute a majority—indeed, the entire preferred stock outstanding—and hence would be plainly entitled under Sec. 4 of the Act of 1910 to apply to the Supreme Court for a sale of the Boston and Maine stock held by the Holding Company.

In the alternative, the petitioners pray that the New Haven trustees as the holders of the preferred stock of the Holding Company in the New Haven estate be ordered to join with the holders of the publicly-held preferred stock in an application to the Supreme Judicial Court of Massachusetts to enforce their claimed lien. And Edmund J. Hurley, a preferred shareholder in the Holding Company, has filed a petition to intervene and seeks an order requiring the New Haven trustees to distribute amongst the holders of the publicly-held guaranteed preferred stock of the Holding Company all the common stock of the Holding Company now owned by the New Haven estate.

These petitions must be denied.

It is true that these are days of adversity for the Holding Company. Since January 1, 1932 no dividends have been paid on the Boston and Maine stock owned by the Holding Company, leaving the Holding Company without income available for dividends,—at least for the time be-

ing. And during this same period of adversity the New Haven's guaranty, upon which—but for the intervention of bankruptcy—the publicly-held stock might have relied for the continued payment of its dividends, has been permanently rejected. But the resulting misfortune to the holders of the publicly-held preferred stock does not constitute legal ground for the ex-appropriation of the common stock or the preferred stock owned by the New Haven estate. Although under Sec. 77 holders of the publicly-held preferred stock have a claim in damages which they are entitled to prosecute they may not divert to their exclusive recompense assets owned by the New Haven estate to which other creditors of the New Haven have an equal right to look.

Nor may the New Haven trustees be required to join with the holders of the publicly-held stock in an application, under the statutes referred to which constitute the charter of the Holding Company, to the Supreme Judicial Court of Massachusetts for the sale of the Holding Company assets. Such a course is plainly not to the advantage of the New Haven estate. Nor is it a course required under any obligation imposed by the Massachusetts statutes.

The Act of 1909 to which the Holding Company owes its existence contains no limitation upon the life of its corporate creature. The corporation was created "for the sole purpose of acquiring and holding the whole or any part of the capital stock," etc., of the Boston and Maine. Granted that adverse conditions have temporarily deprived the enterprise of profit, nothing has transpired to frustrate the legislative authorization to *hold* the investment made in happier days.

The Act of 1910, which authorized the issue of preferred stock and defined its appurtenant rights, in Sections 1 and 2 subjected the Boston and Maine stock owned by the Holding Company to a lien in favor of the preferred stockhold-

ers of the Holding Company. This lien was designed to give the preferred stock "preference and priority over all other stock of the corporation," i.e., over its common stock. But under Section 1 the lien in favor of the preferred stockholders was enforcible not upon the issue of the preferred stock but only (a) "upon dissolution of the corporation or in liquidation of its affairs," or (b) "in case of a default in the payment of any stipulated dividend on said preferred stock." Only upon the occurrence of either of these two events was the lien subject to the form of foreclosure specified in the Act.

But even if the liens should thus become subject to foreclosure, the Act does not provide that every stockholder should have the right to institute foreclosure proceedings. On the contrary, Section 4 of the 1910 Act provides that "the holders of a majority thereof may, in case of a default in the payment of any semi-annual dividend upon such preferred stock, apply in person or by attorney to the Supreme Judicial Court for an order for the sale of said Boston and Maine Railroad stock." The phrase "holders of a majority thereof" plainly refers back and means a majority of all the preferred stock issued and outstanding under the previous sections of the Act,—not the guaranteed stock mentioned only in a later section of the Act. (Sec. 5).

Thus, an application by a majority of all the preferred stock outstanding is the only remedy stated in the Act for the enforcement of the lien. It must be taken as the exclusive remedy intended. Were any single stockholder or a minority group of stockholders, such as those holding the guaranteed stock, intended to have a right to enforce a sale, the authority conferred by Section 4 upon a majority of the stock would have been unnecessary and meaningless.

Section 5 of the Act of 1910 I think somewhat confirms this construction. It provides that any railroad owning

common stock of the Holding Company may acquire and freely sell not *all* its preferred stock in the Holding Company but "*any* of the preferred stock authorized by the Act." Thus the legislature must have had in mind a situation such as that which exists here where the New Haven as a preferred stockholder sold and guaranteed only a minor fraction of its preferred stock. With authority thus expressly granted to create a minority holding in the stock, the absence of provision whereby minority stockholders might apply for a sale and precipitate a liquidation must have been deliberate. It must have been intended that those thus purchasing a minority interest should hold subject to the right exclusively reserved to the majority.

The conclusion indicated is required, I think, even if the petitioners are right in their contention that in a liquidation the publicly-held preferred stock will be entitled to priority over the preferred stock held by the New Haven. This contention is based upon the 1923 decree of the United States District Court for the Southern District of New York which so provided. But nothing in that decree purports to alter, or is effective to alter, the provision of the Massachusetts Act whereby the right to apply for a sale and thus to bring about a liquidation is reserved to a majority of all the preferred stock outstanding.

Although for purposes of this decision I may assume, as petitioners contend, that the publicly-held preferred stock on a liquidation will have priority over that held by the New Haven, I must make it plain that I am not now satisfied to sustain the claimed priority on the merits. Dissolution proceedings brought by the Government against the New Haven resulted in a decree in 1914 providing for the liquidation of the Holding Company. But before the liquidation was accomplished the modified decree of 1923 was entered by consent whereby the Holding Company was returned to its owners. Granted that it was contemplated

that the publicly-held preferred stock should be preferred in the enforced liquidation envisaged by the original decree or in any future liquidation contemplated by the modified decree, it must not be forgotten that the publicly-held preferred was then guaranteed by a solvent New Haven. With the New Haven solvent, it made no difference to its estate whether in a liquidation the publicly-held preferred stock of the Holding Company was preferred to that held by the New Haven, or not: in so far as the publicly-held preferred stock was not liquidated in full from the assets of the Holding Company, it was entitled to look to the solvent New Haven for the payment of any deficiency. But this situation was radically changed by the bankruptcy of the New Haven: no longer is it a matter of indifference to the New Haven estate, now relieved of its guaranty, if the publicly-held preferred stock of the Holding Company is so preferred.

Thus is posed a serious question whether a decree in the dissolution proceedings not brought for the determination of private rights *inter sese*, under the doctrine of *res adjudicata* may be taken to define the present rights of the New Haven estate as against the holders of the publicly-held preferred stock of the Holding Company who were not parties to the dissolution proceedings.

The New Haven's "consent" to the modified decree seems not necessarily to be a complete answer to this question. For this raises a question of jurisdiction over the subject-matter. If the United States Court in New York, in which the dissolution proceedings were brought, had jurisdiction in a proper case to terminate the New Haven's indirect right, through its control of the Holding Company, to vote the Boston and Maine stock owned by the Holding Company, it doubtless had incidental jurisdiction to accomplish that objective by ordering a sale of the Boston and Maine stock owned by the Holding Company and

by supervising the distribution of the proceeds. But when that court before the sale was accomplished found that the case was one not requiring the termination of New Haven control over the Holding Company and accordingly ordered the Holding Company assets returned to their legal owner, was not its jurisdiction exhausted? In such a situation, whence came jurisdiction to prescribe a classification of priorities in any future liquidation different from that existing when the court in New York took the property into its custody and different from that prescribed by the Massachusetts legislature in the Act of 1910?

The petitioners also remind me of the fact that pursuant to the modified decree in the dissolution proceedings certificates for 28,000 shares of the preferred stock of the Holding Company—some of which stock they now represent—were thereafter presented by the then holders thereof to the Holding Company which stamped them with an endorsement stating them to be "entitled to preference in liquidation according to the terms of the" dissolution decree as modified in 1923. It is apparently the suggestion of the petitioners that this transaction between the holders of the 28,000 shares and the Holding Company was effective somehow, perhaps by estoppel, to bind the New Haven as the holder of the remaining shares of the preferred. I have some doubt as to the validity of this contention also. Unless the dissolution decree, under the doctrine of *res adjudicata*, serves as the basis of an effective estoppel by judgment, it is difficult to see how a transaction between the Holding Company and certain preferred shareholders can serve as an estoppel *in pais*, binding the New Haven estate which apparently was not a party to the transactions giving rise to the alleged estoppel.

Since the petitioners have urged the claimed priority of the publicly-held stock to reinforce their contention that a mere majority of the publicly-held stock may apply for a

sale, while accepting the contention for purposes of this decision I have felt it proper to state the grounds for my present uncertainty as to the underlying merit of the contention. There is no need now to enter a definite ruling on the claimed priority.

Quite apart from the questions just posed relating to the effect of consent decrees and estoppels, the petitioners have cited a multitude of cases believed to support their position. But none, I think, support the proposition that under such circumstances as exist here minority stockholders may avail themselves of a right reserved to the majority to decide whether the corporate assets should be liquidated —a course which would entail the abandonment of the corporate enterprise.

Thus they cite a group of cases of which *Southern Pacific* v. *Bogert*, 250 U. S. 483, is perhaps typical. This case holds that a majority stockholder will be held to a fiduciary duty to account to the minority for the "fruits" of its action "which it has not shared with minority." The wrong there complained of was a refusal "to make a *pro rata* distribution on equal terms." But that is not the situation here. By refusing to apply for a sale, the New Haven trustees have not excluded the other preferred stockholders from their *pro rata* share in the fruits of a sale. And if at some future time the New Haven shall make such an application, under the Act of 1910 it needs must submit its claims to share in the proceeds for the determination of the Supreme Judicial Court of Massachusetts. (Section 4, last sentence).

Petitioners cite *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, for the observation that "a holding company . . . has fiduciary duties to security holders of its system which will be strictly enforced." It may be granted that pursuant to the sanction of Massachusetts statute the relationship between the New Haven and the

Holding Company is that of parent to subsidiary. But no breach of any fiduciary duty has been shown. The guaranty given the publicly-held stock created a legal—not a fiduciary—obligation. And that obligation was scrupulously performed by the New Haven until rejected in bankruptcy under the compulsion of a plan proposed by the Interstate Commerce Commission and order of court. For that legal breach the Bankruptcy Act gives the guaranteed stock a legal remedy, viz., a claim in damages.

Nor is my holding at variance with *Taylor* v. *Standard Gas Co.*, 306 U. S. 307. This is not a case in which a solvent parent is competing with the creditors or stockholders of a bankrupt subsidiary. The competition here for the mass of assets which comprises the New Haven estate is between the guaranteed stockholders of the subsidiary and other creditors of the New Haven whose plight is equally distressing.

Petitioners cite *Crimmins & Pierce* v. *Kidder, Peabody Acceptance*, 282 Mass. 367, 185 N. E. 393, for the proposition that the rights of stockholders in a private corporation as among themselves and as against the corporation are contractual rights flowing from the agreement of association subject to which the corporation came into existence. If this doctrine has application in the case of a corporation like the Holding Company which owes its existence to a special charter, it supports my holding that under the charter the exclusive right of the New Haven as the majority preferred stockholder to apply for a sale is not subject to interference from minority stockholders who when they bought "were in any event presumed to know of the provision" in the charter.

Petitioners, citing the dictum in *Chamberlain* v. *St. Paul Ry.*, 92 U. S. 299, invoke the doctrine that a creditor may look to the property of his principal debtor put into possession of a surety to indemnify the surety against loss

resulting from his undertaking, if the principal failure to foulto. There is no room for such doctrine here; the New Haven took no property from the Holding Company for its indemnification against future liability on its guaranty. The petitioners' suggestion that the New Haven right, as majority stockholder, to apply for sale, must be treated as the equivalent of a trust res under the doctrine invoked, is untenable. For the New Haven's right to apply for sale under the statute is not property belonging to the Holding Company. It is an independent right belonging to the majority stockholder upon whom it was expressly conferred by the Massachusetts statute.

Like the petitioners, I find no precedent involving the precise facts of this peculiar situation. However, there are clearly established legal principles which are applicable here, and determinative. Thus it is well established that majority stockholders having under the applicable law power to sell corporate assets may not be restrained from so doing by minority stockholders. *Wolcott* v. *American School Furniture Co.*, 122 Fed. 111; *Godkin* v. *Anaconda Copper Co.*, 245 Fed. 225 (cf. 258 U. S. 380); *Lange* v. *Reservation Smelting Co.*, 31 Pac. (Wash.) 208; *Bisset* v. *Crown Seal Co.*, 140 Atl. (Del.) 625; *Colby* v. *Equitable Trust Co.*, 128 App. Div. 262, 108 N. Y. S. 928. And this is so even though the proposed sale is motivated by, and will result in, a benefit to the majority in their capacity as creditors, *Bloom* v. *Consolidated Oil Co.*, 167 Atl. (Del.) 257, or as preferred stockholders, *Allied Chemical & Dye Corp.* v. *Steel and Tube Co.*, 120 Atl. (Del.) 486,—a benefit in which under the facts the minority stockholders do not participate. *Cf. Winkenbiller* v. *Standard Distilling Co.*, 115 Fed. 749.

Here we have a converse situation. But the same principles are applicable. Just as minority stockholders may not restrain a sale which under the law the majority has

power to make, so minority stockholders may not substitute their judgment for that of the majority and compel a sale which the majority opposes. And this is so even when the majority in its refusal to sell is motivated by legal interests in which the minority does not fully share,—as for instance where, as here, if the minority claim of privity should be sustained, any equity in the corporate assets for the majority will be extinguished unless the sale is deferred until the rising value of the corporate assets shall more than suffice for the satisfaction of the minority claim.

An order accordingly may be submitted for entry denying the petitions.

Dated at New Haven this 6 day of March, 1944.

C. C. Hincks,
United States District Judge.

No. 567

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Supreme Court of the United States

October Term, 1951

THE DELAWARE AND HUDSON COMPANY et al.,
Petitioners,

v.

BOSTON RAILROAD HOLDING COMPANY et al.,
Respondents.

MOTION OF DAYTON P. HAJOKEY AND ASSOCIATES FOR LEAVE TO FILE A BRIEF AS FRIENDS OF COURT, OR IN THE ALTERNATIVE, TO OFFER CONSIDERATION OF A BRIEF AS ON PETITION FOR REHEARING.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

JAMES ANGELL MacLACHLAN,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1951.

THE DELAWARE AND HUDSON COMPANY ET AL.,
Petitioners,
v.
BOSTON RAILROAD HOLDING COMPANY ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

MOTION OF DAYTON P. HAIGNEY AND ASSOCIATES FOR LEAVE TO FILE A BRIEF AS FRIENDS OF COURT, OR, IN THE ALTERNATIVE, TO OBTAIN CONSIDERATION OF A BRIEF AS CO-PARTIES PETITIONER.

Being in doubt concerning their procedural rights in this Honorable Court as members of the class of stockholders represented by the petitioner, Delaware and Hudson Company, in this class suit, applicants pray this Honorable Court to entertain this their motion for leave to file a brief as friends of court, without prejudice to any right they may have to submit a brief as co-parties petitioner in support of the petition for certiorari herein, and, in the event that they have such a right as parties, that their brief be considered as a brief by co-parties petitioner,

with or without formal order of leave, as this Honorable Court may deem meet.

Compliance with the rules for amicus petitions where consent of counsel cannot be obtained establishes the same interest which is relevant to applicants' standing as petitioning parties.

Applicants endeavor to comply with paragraph 9b of Rule 27 by filing their motion a reasonable time prior to the consideration by this Honorable Court of the petition for certiorari of the Delaware and Hudson Company in the above-entitled cause. Their interest is easily stated. Compliance with paragraph 9c of Rule 27 at this stage of the proceeding, by stating the relevance to this case of the facts or questions of law that applicants believe will not be adequately presented by the parties, appears to require a brief analysis of the case as they understand it.

The Interest of Applicants.

Mr. Dayton P. Haigney and his undersigned associates are substantial holders of preferred stock in the Boston Railroad Holding Company with a substantial direct financial interest in the outcome of this litigation, as more fully appears from his affidavit which is hereto annexed. They are fully qualified members of the class on behalf of whom the pending proceeding is prosecuted by the Delaware and Hudson Company. On January 9, 1952, they moved the Supreme Judicial Court of Massachusetts sitting in Suffolk County to be admitted as co-petitioners with the Delaware and Hudson Company on the class petition there which the pending petition of said company now seeks to bring here by writ of certiorari. That motion was denied solely on the ground that it came too late. The reason for applicants' delay in seeking separate representation is explained in Mr. Haigney's affidavit.

Reasons for Believing that Questions of Law and Fact will Not be Adequately Presented by Other Parties.

From voluminous documents relatively simple facts emerge:

The dominating stockholder in a corporation sells some of its holding of preferred stock with a guaranty of principal and interest. As an inducement to the modification of an anti-trust decree against it, the guarantor prays and procures a decree of a federal anti-trust court declaring the guaranteed shares entitled to priority in any liquidation, and causes notice of said decree to be stamped on such certificates as a safeguard (and consequently an invitation) to investment therein. The guarantor later suffers reorganization in bankruptcy pursuant to a plan of reorganization which does not deal with claims against the corporation issuing the stock, except by expressly saving the security of the guaranteed stock under the anti-trust decree. The issuing corporation, thus in the position of a principal obligor, has not been reorganized, but the guarantor is now discharged in bankruptcy and its assets, including its retained shares of the preferred stock issue in question, are transferred to the reorganized corporation.

The principal obligor is now undergoing liquidation in a state court. The state court, under the spell of a masterly and ingenious brief for the guarantor, finds the anti-trust decree to be merely declaratory of the pre-existing guaranty, so that the discharge of the guaranty in bankruptcy causes the decreed priority to evanesce in thin air (like a use executed upon an extinguished scintilla juris). Cf. *Pimbe's Case*, Moore, 196 (1585). The federally decreed safeguard and invitation is converted into a trap for the investing public. The security saved the public investors by the federal reorganization decree is impaired to the extent of 90%.

Learned, able and distinguished counsel for petitioner, Delaware and Hudson Company, will doubtless adequately expound the patent federal errors, but the mere existence of clear federal error is inadequate to support a petition for certiorari. Consequently, to show how applicants are not adequately represented, it becomes necessary at this point to indulge in corporate personalities.

The assets, exclusive of cash, of the obligor, the Boston Railroad Holding Company, have been and are solely Boston and Maine stock. The historic aspirations of the guarantor, New Haven Railroad, with reference to New England transportation in general and to the Boston and Maine in particular, were brilliantly disclosed by Louis D. Brandeis, Esq., before the Holding Company was formed. The conflicting aspirations of the petitioner, Delaware and Hudson Company, were conceived long before they were publicly proclaimed by President Loree before the Interstate Commerce Commission in 1923. Down through the decades control of the Boston and Maine and its traffic has been the subject of a cold war. Viewed in perspective, this litigation appears as a minor skirmish in a forty-year campaign. The New Haven asserted an equitable lien in the court below, as a creditor, superior to all stock claimants, on the basis of getting to the Boston and Maine front "fustest with the mostest." This afforded the state court an opportunity to administer symmetrical justice by denying contentions of both parties. That court may have deemed that the funds here in issue might as well go into the war chest whence the bulk of them originally came.

The class character of this suit seems to have been quite overlooked by the state court. This conclusion is supported by the fact, among others, that the court's opinion suggests the absence of evidence that the Delaware and Hudson acquired its stock on the faith of the stamp declaring a priority under the anti-trust decree. The extraordinary

suggestion that a purchaser of a negotiable instrument would not rely on its express terms, particularly when reciting a judicial determination thereof, seems explicable only on the hypothesis that the petitioner was assumed to be preoccupied with traffic to the virtual exclusion of investment considerations. In addition to the ten thousand shares of "publicly" held preferred stock held by the Delaware and Hudson Company, the Amoskeag Company (which also holds both New Haven and Delaware and Hudson securities) has nearly four thousand shares, but approximately ten thousand additional shares are held by scattered members of the general public. Mr. Haigney represents the undiluted interests of the investing public without qualification or conflict of interest. The interest *asserted* by the Delaware and Hudson in this litigation is identical. The difficulty that company encounters in standing for that interest undiluted by considerations of railroad rivalry does not apply to Mr. Haigney or his associates.

Applicants wish to make crystal clear that, apart from establishing their financial interest, they do not pray this Honorable Court to take judicial notice of such facts outside the record here, or to indulge in speculation concerning who controls whom, to what extent and to what end. On the contrary, they seek to disassociate themselves from such matters of common knowledge which properly may and almost inevitably will be the subject of judicial notice.

A petition for certiorari once granted, the legal issues in this case are sharply defined. They become a simple mater of the application of established law to an agreed statement of facts. This Honorable Court has helped the Bar by giving reasons for granting certiorari, when granted. But the burden of frequent statements of reasons for denying petitions for certiorari would defeat the purpose of requiring such writs, so little authority can be

found to show why such petitions are denied. Certainly members of this Honorable Court have given indications that their task in selecting cases for consideration on the merits is one of judicial statesmanship as much as legal technology. With this in mind, applicants fear that, when this controversy is viewed in the light of broad public interests, the struggle of the Titans may cloud the claim of these relatively obscure members of the general investing public. It is common knowledge that the Boston Railroad Holding Company was formed and this stock was put upon the market in an attempt to cause public investors to intervene between the New Haven and the Boston and Maine. The federal anti-trust decree was issued to protect them for having ventured into what had proved to be a dangerous minority position. They have been forgotten by the state court and pray recognition of the federal interest in their protection, and to this end they seek respectfully to emphasize the class character of these proceedings, through filing their brief. Their plight and their counsel's reflections may perhaps also be worthy of the attention of this Honorable Court when it comes to weigh the broad federal issues and policies, which transcend the interests of railroad companies, and which are of primary concern in passing on the allowance of petitions for certiorari.

Distinguished counsel for the Delaware and Hudson have been at once friendly toward these applicants, zealous in the interests of their client, and impeccable toward both. An inspection of a first draft of their petition and brief, generously tendered, discloses no lack of exposition of federal error. There is, however, no reference, at this stage at least, to such questions as the repercussions upon the administration of corporate reorganization in bankruptcy if the decision below is to stand. This Honorable Court has recently been concerned with insuring that a bankruptcy reorganization court have jurisdiction to go

into the affairs of corporations not under reorganization to the extent necessary for the disposition of the task before that court—collecting and redistributing the debtor's assets—but this Court may be equally concerned with permitting the bankruptcy court to keep its task within manageable bounds. If reorganization decrees are automatically going to vest the reorganized corporation with a federal promotion to displace senior interests in corporations not under reorganization, security holders in any corporation in which the debtor has investments must come into the reorganization court and pray not to be displaced without notice and hearing. A judge will be overwhelmed by the solicitations of ten parties with groundless fears for every single party who would really suffer by an application of the doctrine applied by the state court in this case. Goodness knows the task of the trial judge in the New Haven reorganization was onerous enough. If he had been compelled to consider issues such as those the state court deems him to have adjudicated here, the task would have been at once insurmountable and interminable.

At these applicants' suggestion, the petitioner, Delaware and Hudson Company, may call the attention of this Honorable Court to the applicability here of the policy of *State of Missouri* v. *Mayfield*, 340 U.S. 1, 71 S. Ct. 1, 3 (1950), which attaches importance to relieving state courts of misapprehensions concerning federal limitations on their powers to decide cases in accordance with justice under state law. These applicants would like to be heard on such questions.

WHEREFORE your applicants pray this Honorable Court (without prejudice to any right they may have without special leave of court to submit a brief in support of the petition for certiorari of the Delaware and Hudson Company) for leave to file a brief as friends of court, and in the event that such brief may be considered as the brief of co-

parties petitioner, that it be so considered, with or without formal order granting special leave, as to this Honorable Court may seem meet.

DAYTON P. HAIGNEY,
DOROTHY G. HAIGNEY,
DAYTON HAIGNEY AND CO., INC.,
By JAMES ANGELL MACLACHLAN,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1951.

THE DELAWARE AND HUDSON COMPANY ET AL.,
Petitioners,
v.
BOSTON RAILROAD HOLDING COMPANY ET AL.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION OF DAYTON P. HAIGNEY AND ASSOCIATES FOR LEAVE TO FILE THEIR BRIEF.

I, Dayton P. Haigney, make this my sworn statement to establish my interest and the interest of my associates in the above entitled cause, to establish our qualifications as members of the class on behalf of whom this proceeding is prosecuted, and to explain our delay in attempting to become formal parties to the record.

At the time of the decree of the Supreme Judicial Court of Massachusetts determining the priority of the publicly held preferred stock of the Boston Railroad Holding Company, I was the beneficial owner of 506 shares and the holder of record of 33 shares of such stock. Dorothy G. Haigney was and is the beneficial owner of 50 shares and the holder of record of 360 shares of said stock. Dayton Haigney and Company, Inc., was and is the beneficial owner of 184 shares of said stock. Since such decree I have assigned my beneficial interest in 50 shares to a nominee

of my attorney on account of legal services rendered, but my interest has not otherwise changed. The aggregate of 749 shares is beneficially held by said persons solely as members of the general investing public. A correct photostatic copy of one of our certificates is hereto annexed and made a part hereof. All are in identical form.

I am professionally engaged as a dealer in unlisted securities, dealing chiefly with other brokers. I am what is known as a "position" trader. My economic function is to furnish a market for unlisted securities when anybody desires to sell and no buyer is immediately available to take the security at a price satisfactory to the seller, and to perform a comparable service for buyers who wish to acquire securities. I endeavor to sell securities I buy at a sufficient advance in price to cover my costs of operation, to cover the risks of an occasional heavy loss from having securities decline in my hands, and to glean such additional profit as the competitive nature of the business will permit. I publish at short intervals my bid and asked prices, representing the prices at which I am willing to buy and prices at which I am willing to sell some dozens of securities in which I am actively interested. These securities have included the Boston Railroad Holding Company preferred stock since 1929 or earlier. I am not, and never have been, a professional litigant or a dealer in securities in litigation, except to the extent that the securities I follow and deal in for regular market reasons occasionally become the subject of litigation. In fact, during the sixteen years that I have been in business as an unlisted broker, I have never taken legal action in a securities suit nor have I ever been a party in such a suit. It is my design to keep the bulk of my capital free to carry on my business of promoting the exchange of unlisted securities between willing sellers and willing buyers. It is one of the hazards of my business that the market will occasionally move heavily against me,

and I may occasionally have relatively large amounts of capital tied up for an extended period in an unfortunate commitment. The extraordinary market decline of Boston Railroad Holding Company publicly held preferred stock coming upon the decision of the Massachusetts Supreme Court in November, 1935, represents a severe loss to me.

In 1947, Frederic C. Dumaine, Jr., now President of the New Haven Railroad, approached me in his capacity as a director of the Investing Company to join with his interests in a petition for liquidation of the Boston Railroad Holding Company. I declined to accede, deeming that his interests as a railroad financier conflicted with mine as an owner of securities not concerned with freight interchange or financial control.

I was not worried about the priority of my shares. I relied upon the stamping on my certificates which read:

> "The shares represented by the within certificate are entitled to preference in liquidation according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17th, 1934, as modified by the decree of said Court entered on the 4th day of June, 1935, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others."

This stamp appears on the face of the annexed certificate, reading at right angles to the original text.

I was completely taken by surprise by the decision of the Massachusetts Supreme Court in November, 1935, and was caught long seven hundred and forty shares of the stock, which was an unusually heavy inventory of such stock for me to carry in relation to the size of my business and the potential demands of my customers. These held

ings have become virtually unmarketable at the present time.

Upon consulting counsel after that decision, on December 23, 1951, I first came to understand the procedure of a class suit in general, and in particular to be advised that a petition filed by the Delaware and Hudson Company on December 7, 1949, to determine the priority of the publicly held preferred shares was a class suit in which the interest asserted by the Delaware and Hudson Company was identical with my interest and the interests of my associates. I thereupon tried to have our interests so recognized by a motion in the Massachusetts Supreme Court, but that court said the motion came too late for its attention, since the matter was already disposed of, so far as that court was concerned.

My associates have at all times left this business entirely in my charge. I am now seeking, on their behalf and mine, the earliest opportunity to bring our case to the attention of the United States Supreme Court in some appropriate manner.

DAYTON P. HAIGNEY.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

Subscribed and sworn to before me, a notary public in and for said county, this 29 day of January, 1952.

JOHN M. GILBERT
Notary Public.

Notary Public for the Commonwealth of Massachusetts.
My Commission Expires Feb. 18, 1955.

[Seal]

100 SHARES

BA1428

100 SHARES

BOSTON RAILROAD HOLDING COMPANY

INCORPORATED UNDER THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK CITY OR BOSTON, MASS.

This Certifies That ********* DOROTHY G. HAIGNEY **********

is the owner of ONE HUNDRED

of the Preferred Capital Stock of the Boston Railroad Holding Company transferable in person or by attorney upon surrender of this Certificate properly endorsed.

The Preferred Shares of Stock represented by this Certificate are entitled to [illegible] year 1947. The stock represented by this Certificate is issued and held subject to the restrictions, qualifications and conditions prescribed by the Articles of Organization and by the By-Laws of the Company, to all of which the holder of this Certificate by acceptance hereof assents. The holders of said Preferred Shares are entitled to receive dividends at the rate of four per centum (4%) per annum and no more, payable [illegible] and cannot be declared or paid on the Common Stock of the Company unless all dividends on the Preferred Stock for the current year and for all previous years shall have been paid or declared and set apart for payment. The holders of the Preferred Stock are entitled to receive dividends at the rate of four per centum (4%) per annum before any dividends shall be declared or paid on the Common Stock in any year.

CANCELLED

This certificate is not valid until countersigned by the Transfer Agent and the Registrar.

In Witness Whereof, the Boston Railroad Holding Company has caused its corporate seal to be hereto affixed and this certificate to be signed by its duly authorized officers this July 8, 1947.

BOSTON RAILROAD HOLDING COMPANY · 1909 · BOSTON

SHARES $100. EACH

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

DIXIE BROKERAGE & GUARANTY COMPANY OF JACKSON, INC., ET AL — APPELLANTS

v.

No._____

MRS. THOMAS L. BAILEY, STATE TAX COLLECTOR — APPELLEE

STIPULATION

There is presently pending in the above entitled court, No. 688, October Term 1951, entitled Hays Finance Company, et al, v. Mrs. Thomas L. Bailey, State Tax Collector, wherein the sole variances between that case and the above entitled cause are

(a) Both years were embraced in the same declaration instead of being in two separate declarations.

(b) No deposition whatsoever was introduced in evidence in the above entitled cause, but the same was tried exclusively upon stipulation.

(c) There was no written opinion of the Supreme Court of the State of Mississippi when the suggestion of error was overruled.

(d) There was no motion made for a hearing en banc with an opinion thereon.

The opinions in the two causes on the merits rendered by the Supreme Court of Mississippi, though varying somewhat, are substantially the same in legal effect. Compare Hays Finance Company v. Bailey, Miss., 54 So. 2nd 727; Dixie Brokerage & Guaranty Co. v. Bailey, ____ Miss. ____, 55 So. 2nd 438.

It is hereby stipulated by and between counsel for the respective parties that this cause may abide the decision of this Court in said No. 688 and whatever judgment this Court may therein render may be, pursuant hereto, rendered in this cause, and that in this cause by reason of this agreement, there need not be printed any portion of the record (save as this Court may otherwise order), nor any jurisdictional statement, nor brief upon the part of appellee to dismiss or affirm, an appropriate

motion thereof having been in this Court made, and no response by appellant to this motion, and no statement as to the grounds relied upon for reversal, nor need there be any briefs on the merits in this cause filed.

However, should the Court deem that there must needs be any portion of the record or other instruments printed the parties will upon notice forthwith conform.

For the rendition in this cause of a judgment conformable to that to be rendered in Cause No. 688, this stipulation shall be full warrant to the Court and it may thereon rely.

This the 22nd day of April, 1952.

/s/ Hubert Elton Lipscomb
Hubert S. Lipscomb
Lamar Building
Jackson, Mississippi

/s/ John G. Burkett
John G. Burkett
Lamar Building
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FEB 16 1952

Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners hereinafter named hereby respectfully petition this Court for a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts to review a decision of that Court made and entered on the 9th day of November, 1951, in a proceeding instituted in that Court in the first instance.

Summary Statement of Matter Involved

The proceeding here involved is a representative suit brought by the Delaware and Hudson Company (hereinafter referred to as the Delaware), as a preferred stockholder of the Boston Railroad Holding Company, a Massachusetts corporation (hereinafter referred to as the Hold-

ing Company). The Delaware sued on its own behalf and on behalf of other preferred stockholders of the Holding Company similarly situated. Its petition seeks a declaration that these stockholders are entitled to priority in the liquidation proceeding, now pending in Massachusetts, of the Holding Company.

All the common stock, and all but 24,150 shares of the outstanding preferred stock, of the Holding Company are owned by the New York, New Haven & Hartford Railroad Company (hereinafter referred to as the New Haven). The remaining 24,150 shares of preferred stock, all issued under a guaranty from the New Haven, are publicly held; and the Delaware is the owner of 10,000 of such shares, while the petitioners hereinafter named are the owners in the aggregate of 2,144 of such similarly publicly held shares.

The Holding Company was ordered dissolved by act of the Massachusetts legislature in 1946 (St. 1946, Chap. 518); and the Delaware thereafter instituted this proceeding in the Massachusetts Court for a determination that the publicly held preferred stock is entitled to priority as against the preferred stock held by the New Haven.

The Holding Company was organized in 1909 by special act of the Massachusetts legislature (Stat. 1909, Chap. 519) for the purpose of holding the stock of the Boston & Maine Railroad, then owned (allegedly illegally) by the New Haven. All the common and preferred stock of the Holding Company was originally issued to the New Haven, which thereafter sold 28,000 shares of the preferred to the general public with its guaranty (as required by the Massachusetts statute—Stat. 1909, Chap. 519, Sec. 4) of the payment of dividends and principal.

In the instant proceedings before the Massachusetts Court, a priority was claimed in favor of the publicly

held preferred stock as against the stock held by the New Haven, on the ground, among others, that such a priority had been previously expressly adjudged by decrees of the federal courts. And emphasis was placed upon a decree entered on June 4, 1923, in the United States District Court for the Southern District of New York, in an anti-trust suit brought by the United States against the New Haven, the Holding Company and certain other corporate and individual defendants.

That decree had its roots in an earlier federal decree, made in 1914, which ordered the New Haven to divest itself of its stock in the Holding Company by transferring it to trustees who were directed to dispose of it in such manner as not to disturb the statutory priority of the publicly held shares. The decree of 1923, upon which reliance was placed below, authorized the New Haven to regain possession of such Holding Company stock, but expressly declared that the right of the publicly held preferred shares "to be preferred in any Liquidation of said Boston Railroad Holding Company" should not in any respect be disturbed.

Another relevant decree, incorporating a Plan of Reorganization, resulted in 1947 after the New Haven filed its petition in reorganization; that decree, again, provided that it should not "impair any right of the public holders" "to realize on the lien or security of the shares of the capital stock of the Boston and Maine Railroad held by said Holding Company * * *."

The Massachusetts Court recognized in its opinion denying priority (reported in 102 N. E. 2d 67) that as a matter of Massachusetts law and because of the New Haven's guaranty, the publicly held preferred stock would have been entitled to priority in any liquidation of the assets of the Holding Company. The Court held, however, that since in 1947 the New Haven had been dis-

charged from liability on that guaranty in the reorganization proceedings of the New Haven (Sec. 77, Bankruptcy Act; U. S. C. Title 11, Sec. 205), the priority necessarily fell with that discharge of liability. The Court interpreted the 1923 anti-trust decree as not independently adjudicating the existence of any priority on the part of the publicly held preferred stock, but merely that it "undertook to confirm and perpetuate" a priority established under Massachusetts law; it similarly construed the 1914 decree and the 1947 Plan of Reorganization as not establishing but merely recognizing such a priority.

The Massachusetts Court, in so denying the right of priority to the publicly held preferred stock, acted in flagrant disregard of the provisions of the federal decrees here referred to. Priority was established by the decree in 1914; its existence was adjudicated and perpetuated by the decree entered in 1923; and in the reorganization proceedings resulting in the Plan for the New Haven which was confirmed in 1947, the right to priority was expressly preserved to the public preferred stockholders. The failure of the State Court to give effect to a priority established by three federal decrees presents an important federal question.

We emphasize the conflict of the decision of the Massachusetts Court with the provisions of the Plan of Reorganization which, although providing for the discharge of the New Haven's liability on its guaranty, expressly directed that:

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910,

Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

It seems plain that the purpose of this provision was to avoid any possible inference that the discharge of liability on the guaranty would in any way defeat or impair the priority of the publicly held preferred stock.

The decision of the Massachusetts Court deprives the public stockholders of the Holding Company of rights declared and confirmed by the anti-trust decrees of 1914 and 1923 and by the above quoted provisions of the 1947 Plan of Reorganization. And we submit that the Massachusetts Court also gave undue effect to the discharge of the guaranty, in that the Court overlooked or misunderstood the settled doctrine of bankruptcy, that a discharge does not extinguish the obligation itself.

Statement on Jurisdiction

The jurisdiction of this Court rests on 28 U. S. C. Sec. 1257(3). It is settled that where, as in this case, a State Court fails to give due effect to a judgment or decree of a Federal Court, a federal question is presented which is reviewable by this Court on certiorari. *Stoll* v. *Gottlieb*, 305 U. S. 165, 167; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 129, fn. 1; see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed. by Wolfson & Kurland), p. 40. A federal question reviewable by this Court is likewise presented where the case involves the construction of a judgment or decree of a Federal Court. See *Avery* v. *Popper*, 179 U. S. 305, 314.

As noted above, the proceeding herein was commenced in the first instance in the Supreme Judicial Court of

Massachusetts, the court of last resort of that State. Two opinions were rendered by that Court, a majority opinion by Justice Spalding, and a concurring opinion by Justice Counihan. The opinions are reported in 102 N. E. 2d 67. The order of the Massachusetts Court determining the proceeding was made and entered on November 9, 1951. Upon application made by the petitioners herein prior to the expiration of ninety days from that date, an order was granted by Mr. Justice Frankfurter on January 29, 1952, extending the time to file this petition to and including February 18, 1952. This petition for certiorari is filed within that period.

The contention that the publicly held preferred stock is entitled to priority as against the preferred stock owned by the New Haven, on the basis of the Plan of Reorganization approved in the New Haven's reorganization proceedings and on the basis of the 1923 anti-trust decree, was distinctly raised in the petition of the Delaware filed in the Massachusetts Court (Record, pp. 4, 7-8). These contentions, as well as the contention that the Massachusetts Court gave undue scope to the effect of the discharge in the reorganization, were expressly passed upon and rejected by the Massachusetts Court in its opinion.

The petitioners herein are forty-eight in number. They are the beneficial owners, in the aggregate, of 2,144 shares of the publicly held preferred stock of the Holding Company. Pursuant to order of the Massachusetts Court, notice of the petition by Delaware in this proceeding was given to all stockholders of record of the Holding Company, as well as to other interested parties (Record, pp. 18-19). No public preferred stockholders, other than the Delaware, made any formal appearance, but the determination of the Massachusetts Court is nevertheless binding upon them, since it was rendered in a representative suit brought on behalf of all public holders of preferred stock, including the present petitioners.

Out of an abundance of caution, and in order to remove any possible doubts as to their standing here, the petitioners moved the State Court on February 6 for permission to intervene in the proceeding and for a rehearing. Argument was heard on this petition before Lummis, J., and an order was entered on the same day denying the petition without prejudice. The Court stated its decision orally in open court as follows:

> "The Supreme Court of the United States will probably allow these parties to be heard in some form and I think that I will let that Court be the one to do it. Motions denied without prejudice."

Since the petitioners are bound by the decision of the State Court, they are in a sufficient sense parties to the proceedings, and we submit they have standing to petition this Court for a writ of certiorari. We understand that the Delaware is applying for a writ of certiorari. To hold that these petitioners are concluded by the decision below and that they are nevertheless remediless to seek redress for an invasion of their rights protected by the Federal Constitution, would, we submit, itself amount to a clear deprivation of such rights.

Questions Presented

1. Whether the right of priority of the public preferred stockholders in this case, expressly declared and confirmed by decrees entered in 1914 and 1923 in anti-trust proceedings and by the Plan of Reorganization in the reorganization proceedings in 1947, was affected by the discharge of the debtor in the reorganization proceedings.

2. Whether the discharge of liability in the reorganization proceedings could in any event have any greater effect than that of merely barring the public preferred

stockholders from bringing suit against the New Haven on the guaranty.

3. Whether the clear provisions of a Plan of Reorganization approved by a Federal Court in reorganization proceedings, declaring and confirming a right of priority to security holders of a company in which the debtor in reorganization also has an interest, are binding upon the debtor, notwithstanding that the consummation decree thereafter entered makes no reference to such priority and discharges the debtor from liability on a guaranty affecting such securities.

The Petitioners Herein

The names and addresses of the petitioners and the number of shares of the preferred stock of the Holding Company which each of them beneficially owns, are as follows:

Name	*Address*	*No. of Shares*
James B. Magenis	68 Payne Whitney Lane, Manhasset, L. I., N. Y.	80
F. W. Applestein	Baltimore, Md.	15
Chas. A. Bodie	" "	10
F. W. Beachley	" "	5
Eliz. B. Bower	" "	10
C. P. Boyce	" "	100
A. M. & L. G. Carl	" "	20
Ethel B. Cullen	" "	30
Wm. A. Danzer	" "	10
Eleanor S. Dryden	" "	20

Name	*Address*	*No. of Shares*
Margaret M. Dunn	Baltimore, Md.	10
Arthur Jennings	" "	25
E. O'D. Evans	" "	5
L. E. & M. Elliott	" "	5
Emma M. Getz	" "	5
Robert Getz	" "	5
Arthur Jennings	" "	25
Mrs. G. R. Green	" "	6
E. Lynch Gross	" "	10
Wm. B. Gross	" "	10
Myrtle M. Greenstreet	" "	2
Mrs. R. D. Issacs	" "	15
N. W. Kidd	" "	55
W. E. & M. Knecht	" "	5
A. & M. Larsen	" "	10
M. & L. Leather	" "	10
Nancy B. Levering	" "	62
John M. McCall	" "	15
Murphy Favre	" "	35
Pitt C. Gordon	" "	30
Blanche F. Powell	" "	5
O. H. & M. G. Schroedl	" "	10
Isador Schultz	" "	30
Seidel Cleaners & Dyers	" "	30
W. J. & H. E. Seidel	" "	10
Norman Strippy	" "	10

Name	*Address*	*No. of Shares*
E. Gertrude Smith	Baltimore, Md.	20
J. L. & H. Tunstead	" "	5
Jessie K. Wehner	" "	95
Constance A. Weinberg	" "	40
Edward F. Wehner	" "	10
Margaret B. Wilkens	" "	10
Edward F. Williams	W. Newton, Mass.	419
Lida B. Whitaker	Baltimore, Md.	3
George L. Zimmerman	" "	145
L. S. Zimmerman	" "	180
Stein Bros. & Boyce (Co.-Partnership)	" "	377
Stein Bros & Boyce Corp. (Org. Under Laws of State of Md.)	" "	100

Prayer for Writ

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of this Court to the Supreme Judicial Court of the Commonwealth of Massachusetts, directing that Court to certify and send to this Court a transcript of all the proceedings of that Court in this case, to the end that this cause may be reviewed and determined by this Court; that the order and decree of the Supreme Judicial Court of the Commonwealth of Massachusetts be reversed; and that your petitioners be granted such other and further relief as may be proper.

Dated: New York, February 15, 1952.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Petitioners.

Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A summary statement of the matter involved, as well as the required statements with respect to the jurisdiction of this Court, the questions presented, the reasons for the issuance for the writ, and the opinion of the Court below are set forth in the accompanying petition (pp. 1-10, *supra*). Additional pertinent facts are stated in the course of this brief.

Statement

This proceeding was instituted in the Supreme Judicial Court of Massachusetts on a petition by the Delaware, as a preferred stockholder of the Holding Company. The Delaware petitioned in its own behalf and in behalf of such other preferred stockholders of that Company simi-

larly situated as might join in the petition. The petition sought a determination that the Delaware and all other holders of the preferred stock of the Holding Company, other than the New Haven, are entitled to priority in the liquidation of the assets of the Holding Company, as against the preferred stock held by the New Haven.

Pursuant to an order of the Massachusetts Court, notice of the proceeding was given to all stockholders of record of the Holding Company, as well as to other interested parties (Record, pp. 18-19). Answers to the petition were filed by the New Haven and by the receiver of the Holding Company (Record, pp. 22-30, 30-31). Pursuant to stipulation, a statement of agreed facts was submitted to the Court. In accordance with the State Court's practice, one of the Justices of the Court reported the case, without decision, for consideration and determination by the full Court on the pleadings and upon the agreed statement of facts (Record, p. 1). A decision was thereafter rendered by the full Court, determining that the Delaware and other public owners of the preferred stock of the Holding Company were not entitled, as against the preferred stock held by the New Haven, to any priority in the liquidation of the Holding Company.

Statement of Facts

The agreed statement of facts, together with the exhibits annexed thereto, appears at pages 33-84 of the record below.

The Holding Company and Its Securities Guaranteed by the New Haven.

The Holding Company was created by special act of the Massachusetts legislature (St. 1909, Chap. 519) for

the purpose of holding securities of the Boston and Maine Railroad. The 1909 Act authorized the Holding Company to issue only one class of stock, common or general stock, and all that stock was acquired by the New Haven. The New Haven had previously held stock in the Boston & Maine directly; questions were officially raised as to its power to hold stock in another railroad company; and presumably the legislation of 1909 was provided as the answer. The Holding Company acquired, and still holds, as its principal assets, common and preferred stock of the Boston and Maine Railroad.

In 1910 another statute was enacted (Chap. 639) amending the charter of the Holding Company to permit it to issue, and the New Haven to acquire, preferred stock upon certain conditions set forth in that statute and in the 1909 Act. One of those conditions, set forth in the 1909 Act, was:

> "Section 4. Any railroad corporation incorporated at the date of the passage of this act under the laws of this commonwealth may guarantee the principal of and the dividends and interest upon the capital stock, bonds, notes and other evidences of indebtedness of said Boston Railroad Holding Company, and may acquire and hold said stock, bonds, notes and other evidences of indebtedness; *provided, however, that the shares of stock of said Boston Railroad Holding Company shall not be sold or transferable until said stock has been guaranteed as hereinbefore provided.*" (Italics ours.)

Presumably, the theory of this legislation was that any money provided by the public, which would, of course, go either for the purchase of more Boston and Maine stock or for the reimbursement to the New Haven for such purchases, ought not to be furnished without the New Haven's guaranty.

The 1910 Act (Sec. 2) also provided a security in addition to the guaranty: a stautory lien in favor of the preferred stock of the Holding Company upon all the stock of the Boston and Maine Railroad at any time held by the Holding Company:

> "Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock, to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company."

In addition, the 1910 legislation made the guaranty of the New Haven specifically applicable to the preferred stock. Section 5 of the 1910 Act authorized any railroad company owning any of the common stock of the Holding Company to acquire, hold, own and sell any of the preferred stock authorized by the Act and further provided that any such corporation "may guarantee the payment of the stipulated dividends thereon, and of the par value thereof in case of liquidation or distribution" of the Holding Company.

The Holding Company in 1910 and 1911 issued to the New Haven 272,939 shares of its preferred stock, constituting all of its authorized preferred stock. These shares were issued in payment of loans made by the New Haven to the Holding Company to enable the Holding Company to buy Boston and Maine stock. In 1911 the New Haven sold 28,000 shares of such preferred stock to the general public. The certificates for these publicly held shares were endorsed with the full guaranty of the New Haven:

the statute of course permitted nothing less (Record, p. 36):

> "For value received, The New York, New Haven & Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts, and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter 639 of the Acts of Massachusetts of the year 1910."

Of the 28,000 shares of preferred stock thus issued, 1,030 are now owned by the Holding Company, 2,820 by the New Haven, 10,000 by the Delaware, 2,144 by these petitioners, and the remainder by other members of the public. The New Haven's holdings of preferred stock comprise 247,759 shares in all.

The Anti-Trust Proceedings; The Priority Established.

Indisputably, the Holding Company was a device, obvious enough, by which the New Haven procured and exercised control of the Boston and Maine. On this ground, as well as upon others, the United States in 1914 brought a suit in equity in the United States District Court for the Southern District of New York, against the New Haven and the Holding Company, alleging violations of the anti-trust laws. On October 17, 1914, a consent decree (printed in the record below at pp. 62-77) directed the New Haven to transfer all of its stock in the Holding Company to certain named trustees, who were

ordered to take appropriate steps to sell the shares of stock of the Boston and Maine Railroad owned by the Holding Company and then to dissolve the Holding Company. The decree took precautions in order to safeguard the preference, on the basis of which preferred shares had been sold to the public. The decree provided, first, that the trustees "shall make proper arrangements to protect the rights of preferred stockholders of the Holding Company" (Record, p. 63). But the decree went much further than this simple declaration. It defined the implications of the preference and it declared them in terms of *a priority* of the publicly held preferred stock over the preferred stock held by the New Haven. It expressly directed that any sale of the Boston and Maine stock should be made "subject only to the lien of the 28,000 shares of preferred stock of the Holding Company held by other persons" than the New Haven (Record, p. 64); and that out of the proceeds of any sale, the public holders of those 28,000 shares of preferred stock were to be paid all sums due them prior to any payment to the New Haven (Record, p. 65). The decree, in addition, provided as follows (Record, p. 64):

> "Whenever in their judgment it shall be necessary, the trustees may take proper steps to subordinate the statutory lien enjoyed by the preferred shares of the Holding Company held by them to the lien of the 28,000 preferred shares of the Holding Company held by others; but the lien of the preferred shares held by them shall attach to any proceeds from the sale of the shares of the Maine Company remaining after satisfying the claims of the persons holding the said 28,000 preferred shares."

In substance, the effect of this decree—in the absence of creditors of the Holding Company, and there are no creditors—was to dissolve the lien of the New Haven with

respect to the preferred shares. At least the result of the decree was to make meaningless any definition of the rights of the New Haven as those of a lien-holder.

The decree provided that the trustees should use their best efforts to complete the sale of the Boston and Maine stock before January 1, 1917 (Record, p. 64). That time was, however, extended by subsequent decrees, and on May 8, 1923 the Boston and Maine stock was still unsold. On that day, the New Haven filed a petition with the United States District Court (Record, pp. 78-81), requesting a modification of the 1914 decree so as to provide for a transfer by the trustees of the Holding Company stock, back to the New Haven. The New Haven in its petition directly requested the Court to make provision preserving the right of the publicly held preferred stock "to be preferred in any liquidation" of the Holding Company (Record, p. 80). A decree was rendered on June 4, 1923 granting the relief virtually as requested. The decree (Record, pp. 82-84) authorized the retransfer of the Holding Company stock to the New Haven, but it preserved the priority of the holders of the publicly held preferred stock of the Holding Company. The decree thus provided as follows (Record, pp. 82-83):

> "ORDERED that said decree entered October 17, 1914, be amended by striking out all the provisions in paragraphs numbered First and Second of said decree, excepting that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons to be preferred in any Liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of the said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall in no manner be diminished or impaired, and the certificates of said 28,000 shares of preferred stock shall be presented at

> the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference."

We emphasize the phrase "in any Liquidation". At the time this provision was written, the only liquidation which had been in contemplation was a statutory liquidation by trustees acting under a federal decree. In that liquidation, it was clear, the publicly held preferred stock had no mere inchoate preference under general equitable principles: it was adjudicated that the stock had a prior claim to the proceeds of the sale of the assets of the Holding Company. By its decree of 1923, the Federal Court ended the possibility of any liquidation in and under the auspices of its trustees, but it explicitly made a continuing direction that the right to be preferred " * * * in *any* Liquidation of said Boston Railroad Holding Company" "shall in no manner be diminished or impaired".

Pursuant to that decree, the stock of the Holding Company in the hands of the trustees was returned to the New Haven, and at or about that time the Holding Company caused an endorsement to be stamped on the certificates of all of the publicly held 28,000 shares of preferred stock of the Holding Company, as follows (Record, pp. 44-45):

> "The shares represented by the within certificate are entitled to *preference in liquidation* according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others." (Italics added.)

Here there would seem to be the plainest affirmation by the New Haven itself of the rights of the publicly held preferred shares to priority as against the New Haven.

The Reorganization Proceedings of the New Haven.

On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the United States Bankruptcy Act in the United States District Court for the District of Connecticut (U. S. Code, Title 11, §205). Pursuant to order of the District Court dated March 13, 1936, the president of the Holding Company filed a claim (No. 82) "on behalf of the 24,150 shares of the Holding Company preferred stock outstanding in the hands of the public".

By order entered March 6, 1944 the District Court approved a plan of reorganization for the New Haven, which had been previously approved and certified by the Interstate Commerce Commission. That plan provided in part as follows (Record, pp. 38-39):

> "Sec. J. Clause (17). The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the Court to the total amount of all such claims. The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, to the extent finally allowed by the Court for any breach of the contract of guaranty, both for par value and dividends, be included among the holders of unsecured obligations and claims.
>
> Sec. K. * * * The principal debtor's guaranties of the bonds of the New York, Westchester and Boston Railway Company * * * and of the preferred stock

of the Boston Railroad Holding Company shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in Clause (17) of Section J hereof. *Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923.*" (Italics ours.)

We submit, and shall argue (Point I, *infra*), that this decree itself is dispositive of the issue in this case. The Federal Court recognized the various possible bases upon which the right of priority might be considered to stand—the State's common law, the State legislation of 1909 and 1910, or the federal decree of 1914, or the decree of 1923—and it provided that whatever the source of the priority, the decree in reorganization should not disturb it, notwithstanding that the reorganized company was not to assume any liability upon the obligation itself.

It is consistent that on August 4, 1944, the Court entered an order which allowed a claim for breach of the New Haven's guaranty of cumulative dividends upon the 24,150 publicly held preferred shares, to the extent of $32 per share, and disallowed all other claims on behalf of the holders of such stock. Equally consistently, the Court allowed nothing in connection with the New Haven's guaranty of the $100 par value principal amount of each share. On September 11, 1947 an order entitled "Con-

summation Order and Final Decree" was entered, which granted in general terms a discharge of all the New Haven's obligations, debts and liabilities, and provided for the vesting in the reorganized company of the New Haven's property and estate free and clear of all claims, liens and encumbrances.

In 1946 the Holding Company was dissolved by act of the Massachusetts Legislature (St. 1946, Chap. 518). Section 4 of that statute provided in part as follows:

> "Nothing in this act shall affect the rights of the holders of the publicly held or other preferred stock of Boston Railroad Holding Company, or the lien or liens or priority or priorities, existing in favor of such stock or any thereof. * * * "

The statute further provided for the recognition of the rights of such holders "if the court shall determine that such preferred has rights different from the rights of the other preferred" stock of the Holding Company.

State Court's Decision

The Massachusetts court has determined that the publicly held preferred stock is not entitled to any priority in liquidation as against the preferred stock held by the New Haven. The decision directly rejects the contentions here urged as a basis for review upon certiorari by this Court, and does not rest on any independent non-federal basis.

In the State Court the petitioners' claim of a priority as against the New Haven's preferred stock, was predicated not only upon the federal decrees but also upon the ground, available in the State Court, that priority is dictated by equitable principles established by such cases as *Matter of Title & Mortgage Guaranty Co. of Sullivan*

County, 275 N. Y. 347 and *Ferris* v. *Prudence Realization Corp.,* 292 N. Y. 210, 323 U. S. 650.

The Massachusetts Court accepted those principles as the law of Massachusetts: "that a guarantor of mortgage certificates, who also has an interest in the mortgage, cannot share in the proceeds of its collection until the certificate holders are paid, unless there is a clear reservation in the certificate of the right of the guarantor to share on a parity with other certificate holders" (Record, p. 96). The Court further indicated its view that that principle was applicable in the instant case so long as the New Haven's guaranty of the publicly held preferred stock continued in effect (Record, pp. 96, 98).

The Massachusetts Court, however, held that the priority fell with the discharge of the New Haven, in the reorganization proceedings, from further liability on its guaranty of the publicly held preferred stock (Record, pp. 97, 98).

We submit that the Massachusetts Court erred in holding that the priority had existence and survived only by reason of Massachusetts principles of equity. The Massachusetts Court, in taking this view, disregarded the federal decrees which expressly adjudicated the existence of a priority and expressly defined its scope. That Court further erred in holding that the reorganization decrees had the effect of destroying that priority.

POINT I

The final decree in the reorganization proceedings did not alter the priority to which the publicly held shares of preferred stock were entitled.

We have pointed out above that the decree entered in 1914 in the anti-trust suit directed that the New Haven's holdings of the stock of the Holding Company be transferred to trustees and that the trustees sell the Boston and Maine stock held by the Holding Company; that the decree defined the priority to be accorded the publicly held preferred stock of the Holding Company, as against the New Haven's stock, in distributing the proceeds of the sale; that in 1923, no sale having been made, the New Haven petitioned for a modification of the 1914 decree and for a retransfer to it of the Holding Company's stock; and that in its petition the New Haven specifically asked, as a condition of the requested modification:

> "* * * that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Company held by the New York, New Haven & Hartford Railroad Company, shall be in no manner diminished or impaired" (Record, p. 80).

The decree entered on that petition similarly explicitly provided that "the right attaching to such shares of preferred stock "to be preferred in any Liquidation of said Boston Railroad Holding Company", as against the New Haven's holdings of stock in the Holding Company "shall in no manner be diminished or impaired and the certifi-

cates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference" (Record, pp. 82-83). The certificates for the publicly held shares of preferred stock were thereafter stamped accordingly (Record, pp. 44-45).

It is clear that the 1923 decree thereby accorded to the publicly held preferred stock an explicit preference "in any liquidation" of the Holding Company, as against the New Haven's holdings of preferred or common stock in that company. It is important to note that it was the 1923 decree which established this preference and priority, and not State principles of equity, or the Massachusetts Legislature. Only the 1923 decree defined the rights of the publicly held preferred shares other than in merely general terms of guaranty or preference. The 1923 decree explicitly spelled out the implications, and adjudicated the existence of a priority in the event of *any* disposition of the assets of the Holding Company.

No appeal was ever taken from the 1923 decree, and the decree has never been vacated or modified. The Court in those proceedings had jurisdiction of the parties and of the subject matter, and there is no basis for any collateral attack on the decree, in the instant proceeding or elsewhere. The decree must be given full force and effect.

Surely the New Haven is in no position to complain of that decree. The New Haven itself, in its petition asking for modification of the 1914 decree and the restoration to it of the Holding Company stock transferred to the trustees, asked that the very priority here sought be accorded the publicly held preferred stock, and it made that request because it recognized that such a condition might be prerequisite to the granting of the relief sought by it.

The majority of the Court below took the position that the decree in the anti-trust proceedings did not *create* any priority, but merely recognized a priority upon well settled equitable principles deriving from the New Haven's guaranty, and that the priority fell when the guaranty was discharged in the reorganization proceedings. The distinction is at best tenuous and, we think, non-existent. Here was a decree declaring the existence of the right of priority in the publicly held preferred shares. The source of that declaration and the reasons for the conclusion that a priority existed, are not now important. The fact is, as the Massachusetts Court itself stated, that the anti-trust decrees "undertook to confirm and perpetuate that subsisting right" (Record, p. 98). We are not aware that material differences should follow from the choice of words with which to describe the intent of the anti-trust decrees.

One of the Judges of the Court below (Counihan, J.), in a separate concurring opinion, stated that he was of the opinion that the effect of the 1923 decree in the anti-trust suit "was to subordinate the rights of the preferred stock of the holding company held by the New Haven to the rights of the publicly held preferred stock in any liquidation of the holding company" (Record, p. 105). We believe that no other conclusion is reasonably possible. The 1923 decree was the result of a petition by the New Haven. It requested such a declaration as to priorities as a condition of ultimate relief. The declaration was accordingly made in the 1923 decree, precisely as prayed for. There is nothing in its text which relates the priority to the guaranty, or makes the priority depend upon any rule of State law or act of State Legislature.

The Power of the Federal Court

The majority of the Court, however, indicated that it interpreted the decrees in the anti-trust suit as it did

because otherwise there would be "serious questions" with regard to the power of the Federal Court to make a decree in an anti-trust suit establishing such a priority (Record, pp. 98-99). In this, we submit, the Court was in error.

Even if we assume that it might have been wrong for the Federal Court to have inserted in its decree a provision with respect to the priority to be accorded to the public holders of the preferred stock of the Holding Company, the decree cannot be collaterally attacked in a subsequent proceeding in a State court. As this Court held in analogous circumstances in *Swift* v. *United States*, 276 U. S. 311, 331, "the error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much". No appeal having been taken from the 1923 decree, and there being no jurisdictional defect in it, the Massachusetts court was required to give full effect to that decree in the instant proceedings. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 293-294; *Howat* v. *Kansas*, 258 U. S. 181, 189-190.

It was within the power of the Court in the anti-trust proceedings to provide for a preference for the public holders of the preferred stock of the Holding Company in the event of liquidation of the company. Surely, the degree of control of the New Haven over the Boston and Maine Railroad would be affected by whether the public stockholders rather than the New Haven had a prior lien upon the stock of the Boston and Maine Railroad owned by the Holding Company. There is nothing to show that the Court would have been agreeable to restoring the stock of the Holding Company to the New Haven, without some provision, such as that suggested by the New Haven itself and incorporated in the 1923 decree, granting the public stockholders preference as against the New Haven in the event of *any* liquidation.

The Effect of the Plan of Reorganization

We repeat, however, even under the view of the Massachusetts court that the 1923 decree merely "undertook to confirm and perpetuate a subsisting right" to priority on the part of the publicly held stock, that the priority was not disposed of because the guaranty was discharged. Whether that right of priority was created by the 1923 decree or whether its existence was merely "confirmed and perpetuated", the fact remains that that right was confirmed in these federal decrees and subsequently confirmed in the New Haven's reorganization proceedings. The court in those proceedings explicitly decreed that that right was in no way to be impaired by the provisions of the Plan of Reorganization. What is more, the Plan seems to have anticipated and disposed of the very question here in issue, for, as we pointed out above, the Plan protected "any right of the public holders" "to realize on the lien or security" of the assets of the Holding Company—regardless of the source of that right and whether it derived from State judicial or State legislative sources or from Federal decrees (Record, p. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, *or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923.*" (Italics ours.)

It is plain that the purpose of this qualifying provision was to avoid any possible inference that the non-assumption of the guaranty by the reorganized company was in any way intended to defeat or impair the right

of priority of the publicly held preferred stock. The very juxtaposition of these provisions permits of no other inference.

The Massachusetts Court preferred to stress the provisions of the consummation decree in the reorganization proceedings discharging the New Haven from liability on its guaranty, and vesting the New Haven's property in the reorganized company free and clear of all claims, liens and encumbrances. The consummation decree, however, must be read in conjunction with the Plan of Reorganization approved by the Court. That Plan, as pointed out above, explicitly limits the possible consequences that might otherwise be attached to the bald provisions of the consummation decree, and the Massachusetts court was not free to ignore it. Section 205(f) of Title 11 of the U. S. Code provides that "upon confirmation by the judge, the provisions of the Plan [of Reorganization] and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders * * *, and all creditors * * *".

Thus, in interpreting the consummation decree in the reorganization proceedings as terminating the right of priority of the public stockholders, the Massachusetts court disregarded the clear provisions of the Plan of Reorganization directing the survival of that very right. The public stockholders stand deprived of rights declared and confirmed by the 1923 anti-trust decree and by the decrees in the reorganization proceedings.

Improper Effect Given to the Discharge, Under General Law of Bankruptcy

Even if we put aside the saving provision of the Plan of Reorganization, and even if we assume moreover that the public stockholders' right of priority derived solely

from the guaranty, it does not follow that the discharge of the New Haven's liability on its guaranty operated to defeat that priority. The Massachusetts court overlooked a well settled doctrine in bankruptcy that:

> "A discharge is neither a payment nor an extinguishment of a debt. When properly pleaded, it is a bar to the enforcement of an existing debt by legal proceedings, and, thus, it amounts merely to a personal defense which is waived if the debtor chooses not to avail himself of it. A discharged debt may be renewed by a new promise * * *." (*In re Innis*, 140 F. 2d 479 (C. C. A. 7th), cert. den. 322 U. S. 736.)

As this Court pointed out in *Zavelo* v. *Reeves*, 227 U. S. 625, 629, the theory is that "the discharge destroys the remedy but not the indebtedness".

It is submitted that a discharge granted in reorganization is of the same tenor as a discharge granted in bankruptcy. Since, then, the discharge does not destroy "the indebtedness", equitable rights or incidents to those rights which may have had their origin in such indebtedness are similarly not destroyed (See 1 Collier on Bankruptcy, §17.27, pp. 1654-1655). In the instant case the New Haven was relieved by the reorganization of liability for the indebtedness represented by the guaranty, but priority rights (incident, we will assume, to such guaranty) survived the discharge and cannot be affected by it. In the light of this principle, the explicit provisions of the Plan of Reorganization discussed above seem to us to make this conclusion certain.

It does not matter if we take the position taken by the Massachusetts court, that the 1923 decree in the anti-trust proceedings, in providing for the public stockholders' priority right, merely "undertook to confirm and perpetuate a subsisting right". The right so "confirmed and

perpetuated'' could not be defeated or impaired in the subsequent reorganization proceedings merely by the discharge of the guaranty. On the Massachusetts court's own assumption, the 1923 decree at least transformed the priority right from an inchoate right based on equitable principles into a right confirmed and recognized by a court's decree. Until that decree was reversed on appeal or duly vacated or modified, the rights declared by it continued with full force and effect. The mere discharge of the guaranty could not of its own force operate to alter or modify that decree or the rights declared by it.

Conclusion

The decision of the Massachusetts court erroneously deprives the public holders of the preferred stock of the Boston Railroad Holding Company of valuable property rights declared and confirmed by decrees duly entered by the Federal Courts in prior anti-trust and reorganization proceedings affecting the New Haven. Questions of general importance as to the meaning and effect of such decrees are presented, as well as an important question in the general law of bankruptcy. It is accordingly respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners.

HENRY COHEN,
ARTHUR KARGER,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 593.

JAMES B. MAGENIS, F. W. APPLESTEIN,
CHARLES A. BODIE ET AL.,
Petitioners,

v.

BOSTON RAILROAD HOLDING COMPANY ET AL.

BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

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BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

This petition relates to the same case in the Supreme Judicial Court of Massachusetts as the petition of the Delaware and Hudson Company, docket number 567, presently pending before this Court. We submit that this petition should be denied upon two independent grounds: first, that the case is not one which merits the consideration of this Court, and second, that the petitioners have no standing to maintain it. The reasons for the first ground are all set forth in the brief in opposition which we have already filed in number 567. There can be no occasion to repeat them here, so we ask leave to refer the Court to that brief. This brief will be limited to the second point.

THE PETITIONERS HAVE NO STANDING.

We have found no case dealing with a petition for certiorari brought under the post-1916 practice by a person not a party to the suit in which the decree in question was entered. It is, however, settled that a person not a party may not appeal to this Court.

> *Guion* v. *Liverpool, London, & Globe Insurance Co.*, 109 U.S. 173.

And a stockholder in a corporation whose property is being foreclosed and who, consequently, has precisely the same substantial interest in the subject matter of the suit as these petitioners do cannot appeal where he has been denied the right to intervene in the trial court.

> *Ex parte Cutting*, 94 U.S. 14.

Further, a person whose rights are collaterally affected by a decree may neither appeal nor have certiorari.

> *Ex parte Leaf Tobacco Board of Trade of the City of New York*, 222 U.S. 578.

(This was before the change in practice from appeal to certiorari in 1916.)

These are direct authorities against the present petition. *Ex parte Cutting* is particularly close, since there the petitioners had moved to intervene and their motion had been denied by the Circuit Court just as the similar motion by the present petitioners has been denied by the Supreme Judicial Court. The fact that this denial was without prejudice (rec. p. 10) does not change the situation. The important point is that the petitioners were not admitted as parties and such an admission is essential to provide *locus standi* to maintain a petition for certiorari. It was

entirely appropriate for the denial to be made without prejudice since, conceivably, further proceedings might be taken in the Supreme Judicial Court with reference to which the petitioners might desire to intervene.

The order made on January 29, 1952, by Mr. Justice Frankfurter (Exhibit "B," rec. p. 9) clearly recognized the necessity that the petitioners be admitted as parties in order to maintain their petition for certiorari. That order states that it was entered "on the assumption that the Supreme Judicial Court of Massachusetts will act expeditiously on the motion, relevant to the disposition of this application, to be brought before it on February 6, 1952." If, as the petitioners apparently maintain, the action of the Supreme Judicial Court on the motion to intervene was of no consequence whatever as far as their petition for certiorari was concerned, there could have been no occasion for this recital in Mr. Justice Frankfurter's order.

THE POSITION OF THE PETITIONERS WITH REFFRENCE TO THE LITIGATION.

Conceivably it might be suggested that the petition could be treated as carrying with it an application to this Court to permit intervention for purposes of the petition. This would not be appropriate, for several reasons.

In the first place, such an application would have to be filed in a proceeding pending in this Court. The petition in number 567 is properly before the Court, so the current petition on any such theory should have been filed in number 567 and not as a separate petition. Further, there is no possible occasion for multiplying the parties in this Court. Any relief granted to the Delaware and Hudson Company, petitioner in number 567, would necessarily enure fully to the benefit of the present petitioners quite as much as any relief granted on the present petition itself.

Finally, the facts with reference to these particular petitioners are not such as to commend them to the discretion of the Court. It is apparent that the entire litigation is a speculative enterprise on the part of the holders of the guaranteed stock. When the case was first here (336 U.S. 932), it appeared that as early as 1944 an alliance was made amongst stockholders to use their stock to obtain a dissolution of the Boston Railroad Holding Company and that they had entered into a formal escrow agreement looking toward that end. The Delaware and Hudson Company, petitioner in number 567, was a party to that agreement. These allies were successful in obtaining the passage of the 1946 statute dissolving the Holding Company. That statute was passed in the middle of 1946 and the litigation commenced in July, 1947, with the original petition which was the basis for the proceeding which was dismissed by this Court at 336 U.S. 932. That case was argued in the Massachusetts court in April of 1948 and was decided in October of 1948. The receiver was appointed in June of 1949 and the second petition of the Delaware and Hudson Company, which is the basis of the present petition for certiorari, was brought in December of 1949. It was argued in the Massachusetts court in April of 1951 and was decided by that court in November of 1951. Reference to the schedule of stockholdings and dates of acquisition, printed at pages 5-8 of the record (eliminating the stockholders who joined in the motion in the Massachusetts court but do not join in the petition in this Court), shows that of 2194 shares represented all but 140 were purchased in or after 1946, and, of the 140, 50 shares were owned by a stockholder who materially increased his holdings thereafter and bought shares as late as June, 1951. Breaking the holdings down into years, it appears that 140 shares were acquired in 1946, 35 in 1947, 382 in 1948, 46 in 1949, 260 in 1950, and 1191 in 1951, so that it is

entirely apparent that these petitioners were more interested in buying into litigation than in buying stock. It is interesting to observe that, of the 1191 shares purchased in 1951, 100 shares, which is the second largest single purchase shown, were bought on November 13 after the decision of the Massachusetts court which is attacked by the petition.

Further, it is appropriate that the Court's attention be called to the fact that two of the petitioners, C. P. Boyce and Edward F. Williams, are directors of the New York, New Haven & Hartford Railroad Company. This does not appear on the record but it seems to us that it is appropriate to state it in this brief since it was only upon the filing of the petition in this Court that the fact became pertinent, and there is no opportunity for pleading in which to raise the point. Mr. Williams is shown in the petition as holding 419 shares and the dates of acquisition given at page 7 of the record show that all were purchased in 1951. Mr. Boyce is shown as holding 100 shares, which, it appears at page 5 of the record, he purchased in 1947 and 1948 and his partnership and corporation, Stein Bros. & Boyce and Stein Bros. & Boyce Co-op, shown at page 10 of the petition as holding 377 and 100 shares, respectively, purchased in 1950 and 1951. We can see no occasion why the Court should feel sympathy for petitioners who speculate in litigation.

We ask the Court to deny the petition.

Respectfully submitted,

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Office - Supreme Court, U. S.

Supreme Court of the United States

October Term, 1951

No. 593

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against

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REPLY BRIEF ON BEHALF OF PETITIONERS

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Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

Statement

This brief is submitted in reply to the brief of respondent, New York, New Haven and Hartford Railroad Company, opposing petitioners' application for a writ of certiorari herein to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The petition herein relates to the same decision of the Massachusetts court as is involved in the petition of the Delaware and Hudson Company, docket number 567, presently pending before this Court.

POINT I

As to the Merits of the Petition

Petitioners feel that the merits of their position are fully covered in their petition and the brief submitted in support thereof; that the contentions made by the respondent herein are fully answered in that petition and brief; and that no purpose will be served by restating petitioners' position herein.

POINT II

As to Petitioners' Standing in this Court

Respondent urges that petitioners were not formally named as parties in the proceeding in the Massachusetts court, and that they therefore have no standing in this court. The cases cited in respondent's brief (p. 2), however, all involve situations in which the interests of the persons who sought to appeal were only indirectly affected by the decision sought to be reviewed. None of those cases presented facts such as those involved in the instant case.

In the present case the fact is, not only that the proceeding here involved is a representative suit brought on behalf of all public holders of the preferred stock of the Boston Railroad Holding Company, including the present petitioners, but that, pursuant to the order of the Massachusetts court, notice of the Delaware's petition in this proceeding was given to all stockholders of record of the Holding Company as well as to other interested parties (Record, pp. 18-19). The notice thus given to petitioners

was recognition that petitioners have a direct interest in the proceeding. There appears, moreover, to be no doubt that the determination of the Massachusetts court is binding upon petitioners, by reason of the representative character of the suit. Indeed, the decision of the Massachusetts court by its very terms declares the rights, not only of the Delaware and Hudson Company, but of all the public holders of the preferred stock of the Holding Company, including these petitioners. There can therefore be no question that the Massachusetts decision directly and explicitly adjudicates their rights as preferred stockholders and is binding upon them.

As is pointed out in the petition herein, petitioners maintain that the Massachusetts decision deprives them of rights protected by the Federal Constitution. To hold that petitioners are concluded by the decision below and that they are nevertheless remediless to seek redress for an invasion of such rights, would, we submit, itself amount to a clear deprivation of those rights.

As Judge Learned Hand has pointed out, in *West* v. *Radio-Keith-Orpheum Corp.*, 70 F. 2d 621 (C. C. A. 2), the general rule that a person not a party to a suit has no standing to appeal, is based on the assumption that such person is not concluded by the decision sought to be appealed from; and such general rule is not applicable where the person seeking to appeal is bound by the decision. That case involved a receivership proceeding affecting the defendant corporation. The receiver petitioned the court for approval of a certain proposed course of action affecting the corporation, and gave notice of the petition to all creditors of the corporation. In holding that one of the creditors, who opposed the petition, had standing to appeal from the order granting the petition, though he

was at no time formally a party to the proceeding, Judge Hand stated in part as follows (pp. 623-624):

> "* * * it is indeed well settled that generally speaking no person, not a party to a suit, may appeal. Bayard v. Lombard, 9 How. 530, 551, 13 L. Ed. 245; Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 32 S. Ct. 833, 56 L. Ed. 323; Louisiana v. Jack, 244 U. S. 397, 402, 37 S. Ct. 605, 61 L. Ed. 1222. The reason for this is that if not a party, the putative appellant is not concluded by the decree, and is not therefore aggrieved by it. But if the decree affects his interests, he is often allowed to appeal. This has long been true, for example, as to bidders and purchasers at a judicial sale. Blossom v. Milwaukee, etc., R. R. Co., 1 Wall. 655, 17 L. Ed. 673; Williams v. Morgan, 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559; Kneeland v. American Loan Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379. Again in Mitchell v. Lay, 48 F. (2d) 79 (C. C. A. 9), a person enjoined in a receivership suit was allowed to appeal, though not formally a party. * * * But if the creditors are concluded by such an order, the reason for refusing them an appeal ends. * * *"

Similarly, in *Hinckley* v. *Gilman, C. & S. R. R. Co.*, 94 U. S. 467, this Court upheld a right of appeal by a receiver in a foreclosure action, though he was not a party to the action, to the extent that "he had been subjected to the jurisdiction of the court, and made liable to its orders and decrees".

So in the instant case, though petitioners were not formally made parties to the proceeding, since they are nevertheless concluded by the decision below as effectually as if they had formally been named as parties, and since the court actually regarded them as parties by directing notice of the proceeding to be given to them, it is submitted that there is no basis for denying them standing to seek redress for invasion of their rights by that decision.

Petitioners respectfully ask, in the alternative, that if this Court should decide that they have no standing to petition for the writ, they should be given leave to intervene in the pending petition by the Delaware and Hudson Company for a writ of certiorari (docket number 567). There is no doubt that petitioners are aggrieved by the decision below, and that they have no remedy available to them other than by petition for writ of certiorari or by intervention. That intervention is an appropriate remedy in a case such as this, is clear from this Court's opinion in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, where, in distinguishing between the situation where intervention rests in discretion and the case where intervention is a matter of right, it was pointed out that the basic criterion is whether the applicant is "legally bound or prejudiced by any judgment that might be entered in the case". This Court thus declared in part as follows (331 U. S. at 524):

> "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom."

Since, as pointed out above, petitioners' rights and interests as preferred stockholders are concluded by the decision below, they must have standing to bring before this Court their position—either by petition for writ of certiorari or by intervention—that the decision deprives them of rights guaranteed by the Federal Constitution. The state court should not be permitted to deprive petitioners of their rights and at the same time to foreclose them from challenging that deprivation in this Court. Indeed, as is pointed out in the petition herein (p. 7), the Massachusetts Court, in denying without prejudice petitioners' application for leave to intervene, expressed the opinion that this Court "will probably allow these parties to be heard in some form." The Massachusetts Court thus did not entirely foreclose petitioners, but left them free to seek a remedy in this Court.

The interpretation in respondent's brief (p. 3) of Mr. Justice Frankfurter's order extending the time of these petitioners to file their petition for a writ of certiorari, is entirely without substance and merits no further comment.

Respondent (brief, pp. 4-5) further attempts to becloud the issues by wholly improper and extraneous charges that "the entire litigation is a speculative enterprise on the part of the holders of the guaranteed stock". Not only is there not the slightest basis in the record for any such imputation but the fact is that the charges are entirely irrelevant to the issues before this Court. Surely an allegation that one or two of these forty-eight petitioners may be directors of the respondent company has no bearing here.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari be granted or, in the alternative, that petitioners be permitted to intervene in the pending proceeding by the Delaware and Hudson Company (docket number 567) for a writ of certiorari.

Respectfully submitted,

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